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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 MARSH & MCLENNAN AGENCY LLC,

4 Plaintiff,

5 v.

19 CV 3837 (VSB)

6 ELMER "RICK" FERGUSON,

7 Defendant.

EVIDENTIARY HEARING

8 -----x
9 New York, N.Y.
October 3, 2019
10 9:47 a.m.

11 Before:

12 HON. VERNON S. BRODERICK,

13 District Judge

14 APPEARANCES

15 LITTLER MENDELSON

Attorneys for Plaintiff

16 BY: DOUGLAS A. WICKHAM

KEVIN K. YAM

DANIELLA ADLER

17 ELMER "RICK" FERGUSON, pro se

18 MOUND COTTON WOLLAN & GREENGRASS

19 Attorneys for ADR Provider Teros Advisors LLC,

Interested Parties Triad Advisors LLC,

20 and Resource Investment Advisors

21 BY: BARRY R. TEMKIN

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Calder - cross

1 (Hearing resumed)

2 THE COURT: Mr. Calder, you can step up please.

3 JEFFREY CALDER, resumed.

4 THE COURT: Okay. Mr. Calder, I just remind you that
5 you're still under oath.

6 Have a seat. Make yourself comfortable.

7 And I think we're about -- we left off yesterday after
8 discussing the initial final warning meeting. And then, as I
9 understand it, there was a subsequent meeting; is that correct?

10 THE WITNESS: That's correct.

11 THE COURT: Relating to the shift of the business over
12 to Mr. Stephens?

13 THE WITNESS: Correct.

14 THE COURT: And I think you were saying -- well, do
15 you recall how much time elapsed between the two meetings?

16 THE WITNESS: I don't think there was much time
17 between the two meetings.

18 THE COURT: Okay. And so who was at the meeting? My
19 recollection is Mr. Stephens -- excuse me, Mr. Peartree was on
20 the phone.

21 THE WITNESS: Correct.

22 THE COURT: Was there a dialed number he dialed into
23 Mr. Ferguson's office?

24 THE WITNESS: I don't recall whether we set up a
25 conference call or whether he called in, but it was using

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Calder - cross

1 Mr. Ferguson's phone.

2 THE COURT: Okay. And did you -- I may have asked
3 this, I apologize. Did you have an agenda or talking points?

4 THE WITNESS: We did not have an agenda. Bill kind of
5 led the meeting.

6 THE COURT: I'm sorry, kind of what?

7 THE WITNESS: We did not have an agenda. Bill led the
8 meeting.

9 THE COURT: All right.

10 So why don't you describe what was said during that
11 meeting.

12 THE WITNESS: So during the meeting, we talked about
13 the plan to move Mr. Ferguson's accounts, where he was a
14 registered adviser on them, to Jeff Stephens. Rick was very
15 strong in saying some of those accounts will not go, will not
16 do that, we will not accept that.

17 And so we reiterated that that was the plan; we were
18 going to do that. And that we would -- we wanted to know which
19 clients had a problem with that, and we wanted to reach out to
20 them and talk to them, find out what the issues were and
21 present alternatives.

22 THE COURT: And when you say "alternatives," was there
23 a discussion about what those alternatives could be?

24 THE WITNESS: Sure. Not in that meeting, but we knew
25 the alternative to that would be that Bill Peartree would come

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Calder - cross

1 and be the primary contact for those accounts.

2 THE COURT: Okay. And was there ever any
3 consideration of continuing Mr. Ferguson with those accounts?

4 THE WITNESS: There was not, because Mr. Ferguson had
5 stated that he would not continue as a fiduciary on those
6 accounts.

7 THE COURT: So, in other words, even if Mr. Peartree
8 was going to take over, the business would still be allocated
9 to Mr. Stephens?

10 THE WITNESS: If Mr. Peartree took it over, it would
11 be allocated to Mr. Peartree. So the accounts would be
12 coded -- the accounts that didn't want to have Mr. Stephens as
13 the fiduciary, but accepted Mr. Peartree as their fiduciary,
14 those would be coded to Mr. Peartree. He's a producer. So he
15 would get credit for those accounts. And the accounts that Mr.
16 Stephens has, he would get credit for those.

17 THE COURT: Okay. So was the idea that no matter
18 what, Mr. -- in other words, for the clients that -- when
19 Mr. Ferguson indicated he didn't want to be a fiduciary if
20 Mr. Stephens' name was going to be on it, that's my
21 understanding of what --

22 THE WITNESS: Actually, he said he did not want to be
23 a fiduciary on an account that he was not paid for.

24 THE COURT: Okay. Did he say that at the meeting?

25 THE WITNESS: He said it a number of times.

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Calder - cross

1 THE COURT: And when he said that at the meeting, did
2 you or Mr. Peartree have a response to that?

3 THE WITNESS: Well, I think at that point in time we
4 said we are making the change and we need to know which
5 accounts are going to have a problem with that change.

6 THE COURT: Okay. But no one -- because I had
7 under -- perhaps I misunderstood. I thought I had understood
8 that his compensation -- he wasn't getting paid for them --

9 THE WITNESS: He was not.

10 THE COURT: So no one -- at that meeting did anyone
11 say, But you're not getting paid for them, so what's the
12 difference?

13 THE WITNESS: I don't know if we said it at that
14 meeting or not, but certainly that's the case.

15 THE COURT: And was there a reason why Mr. Ferguson's
16 accounts were being turned over to Mr. Stephens and not the
17 accounts of -- and I apologize, there was another -- in the
18 shift over to Marsh & McLennan Securities, right, there was
19 another -- I thought there was another --

20 THE WITNESS: Ryan Stover?

21 THE COURT: Yes, Mr. Stover.

22 THE WITNESS: Ryan is in our San Diego office, and he
23 works primarily in the San Diego and Orange County markets.

24 Bill Peartree has a number of accounts in the bay area
25 as well.

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Calder - cross

1 THE COURT: Okay. But is there any reason why -- in
2 other words, why Mr. Ferguson's accounts versus Mr. Stover, in
3 other words, in shifting them to Mr. Stephens.

4 THE WITNESS: Mr. Stover is a producer and he's
5 compensated based on a commission.

6 THE COURT: Okay. So again, so the idea was, from --
7 well, do you know -- were you part of that decision or
8 Mr. Peartree made the decision? Is that an accurate statement
9 or --

10 THE WITNESS: Which decision?

11 THE COURT: The decision to shift the accounts to
12 Mr. Stephens to assist in basically helping him reach the
13 compensation goal.

14 THE WITNESS: That would have been a decision made
15 with Mr. Peartree and our chief operating officer Hal Dunnen.

16 THE COURT: All right.

17 What else do you recall that was said at that meeting?

18 THE WITNESS: So we talked about the transition of the
19 accounts, the fact that we wanted help doing that. We got on
20 the phone with Bill. Rick was on the phone. And, you know,
21 Rick was asking, Well, what are we going to tell the clients?
22 What are we going to tell them?

23 And Bill said, You're going to have to craft a story
24 to tell the clients.

25 My view of that was that meant you're going to have to

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Calder - cross

1 say we are making a change in your adviser from Mr. Ferguson to
2 Mr. Stephens, and we're going to have to tell them we're doing
3 this because Mr. Ferguson is in a client service executive
4 role, and Mr. Stephens is newly hired as a producer here, and
5 we are making the producer the fiduciary on these accounts.

6 THE COURT: Okay. And when you say it's your
7 understanding, did Mr. Peartree say -- was all he said that
8 we're going to have to craft a story, or did he say and follow
9 it up with what you just said, or was it just basically we're
10 going to have to craft a story?

11 THE WITNESS: I think it was left a little unclear, I
12 would say.

13 THE COURT: Okay. And do you recall -- and when you
14 said -- I think you said Rick was on the phone. But were you
15 in the -- you, yourself, Mr. Ferguson, and Ms. Crain, were you
16 all on the same --

17 THE WITNESS: We were all in the same room.

18 THE COURT: Okay. So when you say on the phone, he
19 was responding to Mr. Peartree who was on the phone?

20 THE WITNESS: Correct.

21 THE COURT: Okay. Do you recall anything else that
22 was said during that meeting?

23 THE WITNESS: I think that was the majority of the
24 meeting.

25 THE COURT: Okay.

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Calder - cross

1 Approximately how long did the meeting last?

2 THE WITNESS: Approximately a half hour.

3 THE COURT: Okay. And during that meeting, did you
4 take any notes?

5 THE WITNESS: I did not.

6 THE COURT: And I think you had indicated, at least
7 with regard to the earlier meeting -- well, do you know whether
8 Ms. Crain took any notes?

9 THE WITNESS: I believe she did.

10 THE COURT: And have you seen any documentation
11 relating to that meeting, in other words, a memo or was it a
12 post-meeting email, or anything like that?

13 THE WITNESS: I don't think I saw it.

14 THE COURT: You know that they exist.

15 THE WITNESS: I think it exists.

16 THE COURT: Okay.

17 THE WITNESS: I don't know that it exists.

18 THE COURT: Okay. When you say that you think that it
19 exists, have others mentioned it or raised it in discussions,
20 or are you just -- based upon the process that you're aware of
21 at Marsh & McLennan, you believe that there would be some
22 documentation?

23 THE WITNESS: Normally, when we have a human resources
24 representative in the room, the process is to document the
25 meeting.

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Calder - cross

1 THE COURT: Okay. All right.

2 Mr. Wickham, I can't remember when I indicated for
3 Ms. Crain -- I guess we covered this whole -- both parts of the
4 meeting, the initial final warning and then the subsequent
5 meeting. I imagine the memo may be one and the same, but I
6 don't know.

7 MR. WICKHAM: I actually looked last night and I
8 didn't see in Mr. Ferguson's personnel file a memo or notes on
9 this particular meeting. There was a copy of the final written
10 warning that was presented to Mr. Ferguson. There was
11 annotations on it saying that he'd refused to sign, and so that
12 was in the personnel file. But it's possible that, you know,
13 Ms. Crain may have notes in a separate set of records.

14 The things that led up to this meeting are lengthy and
15 extensive. This wasn't something that was sprung on
16 Mr. Ferguson. There had been significant other meetings and
17 all that. So we'll pull it all together for the Court just so
18 that we have a clear record on this.

19 THE COURT: That would be helpful, especially to the
20 extent that -- I mean I know I have certain materials related
21 to the particular motions that are before me. I know from, I
22 think -- at least from what I gather, this may have started at
23 least in 2018. There was a whole process that would be helpful
24 to have an understanding of.

25 Okay. Mr. Calder, anything else that you recall about

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Calder - cross

1 that meeting?

2 THE WITNESS: No, I don't think so.

3 THE COURT: Okay. All right.

4 Mr. Ferguson.

5 MR. FERGUSON: Thank you, your Honor.

6 Your Honor, I would respectfully request that today
7 counsel be instructed not to give signals to the client and not
8 to testify quite as much as yesterday. I didn't say anything
9 yesterday because I do understand I'm making mistakes.

10 THE COURT: No, no. I think basically for both sides
11 it should just be if there's an objection, you'll just state
12 the objection. If there's going to be some sort of argument,
13 we can take it at sidebar.

14 MR. FERGUSON: Thank you, your Honor.

15 THE COURT: All right. You may proceed.

16 CROSS-EXAMINATION (continued)

17 BY MR. FERGUSON:

18 Q. Good morning, Jeff.

19 A. Good morning.

20 Q. So, Jeff, we just went over and did a recap of that meeting
21 and what was said or was not said; correct?

22 A. Yes.

23 Q. Jeff, can you turn to -- do you have the exhibits binder?

24 A. I do.

25 Q. Can you turn to Tab 30?

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Calder - cross

1 Jeff, do you see this email down below is dated
2 Thursday, January 3rd, 2019?

3 A. Yes.

4 Q. This is from me to you and Mara; correct?

5 A. Yes.

6 Q. Mara, I know you're waiting for me to sign a letter of
7 reprimand given to me at our meeting on 12/20/18. And in that
8 meeting and alluded to in the letter, if I don't sign the
9 letter, I will be terminated from employment.

10 I respectfully request that you do further
11 investigation and ascertain the correctness of the situation of
12 the letter and allow me more time for my own review, given that
13 the situation appears to possibly involve various violations of
14 various regulations under FINRA, SEC, and ERISA.

15 I took your suggestion/offer of consulting outside
16 counsel, and it was recommended I not sign the reprimand letter
17 as is, in part because there appear to be material errors
18 possibly designed to implicate me erroneously. I was told I
19 have the right to request those possible errors be investigated
20 and, as applicable, corrected before signing the letter.

21 Skip down.

22 In efforts to show I am trying to operate in good
23 faith, it was suggested I clarify certain verbiage with you --
24 certain verbiage you instructed me to use in future
25 correspondence.

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1 Next page.

2 One. In our recorded meeting on 12/20/18, Bill
3 Peartree stated he, Kim Blackmore, and possibly others,
4 cooperated in planning an execution to have clients and myself
5 sign certain paperwork that was designed to ultimately remove
6 me as the named fiduciary investment adviser to my clients,
7 given that, as Bill stated in our meeting, he, Kim, and others
8 knew that leaving me as the named fiduciary adviser, with all
9 liability and legal responsibility, but having clients sign
10 paperwork that gives all the income and company-instructed
11 operational control to Jeff Stephens or someone else, is not in
12 line with fiduciary and financial regulations, thus would
13 eventually result in removal of me as the named fiduciary
14 adviser.

15 MR. WICKHAM: Your Honor, can we get a question?

16 THE COURT: Yes. What's the -- in other words -- and
17 I apologize. Did Mr. Calder receive this?

18 MR. FERGUSON: Yes, your Honor, this email was sent to
19 him.

20 THE WITNESS: Yes.

21 THE COURT: Okay. So what --

22 BY MR. FERGUSON:

23 Q. Perhaps I should just say, Jeff, doesn't this point out
24 everything that I've stated?

25 Number one, the purpose of that final warning letter,

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Calder - cross

1 I refused to sign it because Bill Peartree had admitted that
2 they broke FINRA rules.

3 MR. WICKHAM: Your Honor, could we get a question?

4 MR. FERGUSON: I just said isn't this true.

5 A. I'll answer that.

6 The reason we had a meeting with you for a final
7 warning is because of the history we've had with you, as
8 documented in our employment file, of bombastic behavior,
9 treating colleagues inappropriately.

10 I have coached you over and over in these areas. I've
11 told you if you had a bombastic email to send, to save it
12 overnight, reread it, redo it; if you agreed with it, send it
13 again.

14 That final warning was based on your interaction with
15 colleagues, calling them liars, calling them cheats, calling
16 them thieves. It had nothing to do with FINRA regulations.
17 This was a situation of common respect that our company is
18 built upon that you routinely violated.

19 Q. Jeff, did I ever call anybody a thief? Do you have proof
20 of that?

21 A. You said that we stole your clients.

22 Q. Didn't we just see that Bill Peartree admitted in that
23 meeting they did all this without my knowledge?

24 A. No.

25 Q. Did Bill Peartree admit in that meeting that he and others

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Calder - cross

1 colluded to remove me as the financial adviser to my clients
2 without my knowledge and without the client's knowledge?

3 A. Rick, you said if you weren't going to be paid, you would
4 not be the fiduciary to the accounts, so we had to remove you
5 from those. Those were house accounts.

6 You were not paid as producer, Rick; you were paid as
7 a client service executive. You were not receiving any
8 commission compensation on the existing accounts. Nobody stole
9 any income or anything from you.

10 Q. Jeff, you testified earlier that I was in a hybrid role of
11 sales and service. Are you now saying that's not true?

12 A. You were in a hybrid role in that if you brought in and
13 initiated a new account, you were paid a one-time fee of 25
14 percent. Your salary and bonus outside of that was based
15 solely on service. It was not based on continuing revenue from
16 your client.

17 Q. So sales is what you're saying?

18 A. No. What I'm saying is you were paid a one-time bonus for
19 helping initiate an account that was referred to you.

20 Q. I'm sorry. You misunderstand the question.

21 Was I doing sales? Did I go out and meet with
22 prospects?

23 A. You did, yes.

24 Q. And do business sales presentations with them on my own?

25 A. You did.

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Calder - cross

1 Q. Is that not sales?

2 A. It is sales. You were compensated in a hybrid role for the
3 sales part of what you were doing.

4 But the accounts that you're talking about here, where
5 you wouldn't be removed as a fiduciary, and those accounts
6 would be changed from you to Jeff Stephens, that affected your
7 income none whatsoever.

8 Q. Jeff, what was -- this bonus you're talking about, this
9 compensation, what was it based off of?

10 A. The 25 percent bonus was based on a number of criteria that
11 was outlined in your client service executive compensation
12 sheet. It was based on -- if you were referred into or brought
13 in a new account, you were paid 25 percent for initiating the
14 account or a closing the referral. But you had to demonstrate
15 that you had meetings with the client, you had to help onboard
16 them, you had to obtain the broker of record letters, and you
17 had to implement the new client.

18 Q. So sales. I got a 25 percent commission payment based off
19 the commissions of the sales I did.

20 A. One-time bonus payment on new business only. No payment
21 whatsoever on recurring revenue from existing accounts.

22 Q. Does what happens in the future remove being sales? Did I
23 not go out and do sales and get paid based on commission for
24 doing sales?

25 A. You got paid a one-time 25 percent bonus, which is

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Calder - cross

1 completely different than the way we compensate producers.

2 Q. Do producers get paid based on the commissions they bring
3 in?

4 A. Yes.

5 Q. Doesn't that sound exactly like what you just said? I got
6 paid -- it doesn't matter if it's one time or every year, I got
7 paid based on the commissions I brought in.

8 THE COURT: Mr. Ferguson, that's more argument. In
9 other words, I understand -- and you'll be able to testify
10 yourself. But I understand what the testimony is.

11 Next question.

12 Q. Jeff, so in this same email, if you go over to the last
13 page -- I'm sorry, second to the last page, the first full
14 paragraph at the top: As follow-up to our meeting, you all
15 instructed me to craft a story --

16 MR. WICKHAM: Can we get a question, your Honor?

17 THE COURT: Well, first, in other words, he may read
18 something and let's see where it's going.

19 MR. WICKHAM: Okay.

20 Q. Craft a story to the clients and business planning efforts
21 to coincide with the original crafted story to get clients to
22 sign additional paperwork removing me as their fiduciary
23 investment adviser and naming Jeff Stephens.

24 What does "craft a story" mean?

25 A. So in this context, "craft a story" is we are going to go

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Calder - cross

1 out and tell our clients that we're removing Rick Ferguson as
2 your fiduciary, and we are implementing Jeff Stephens. He's a
3 new producer here, so we want to have the talking points down
4 when we go and meet with the clients regarding the change.

5 Q. Why would we be talking about this if Bill Peartree,
6 myself, and the retirement services division had planned this
7 all out 2017-2018? Why are we talking about it now?

8 A. Because this is a point in time where it was going to be
9 executed. And we wanted to make sure that we all understood
10 what we were going to tell the clients, how we were going to
11 explain the change, and make sure they were comfortable with
12 the change. And if they weren't, we were then going to suggest
13 alternatives.

14 Q. So you do agree that myself, Bill Peartree, the retirement
15 services team, we planned out this move well in advance of the
16 time frame when we sent out the email?

17 A. I'm unaware of the specifics of the planning, Rick.

18 Q. Jeff, does it sound reasonable that myself, Bill Peartree,
19 and the rest of the retirement services team just one day
20 decided to write a letter to all the clients, saying you're
21 moving from SagePoint Financial to MMA Securities?

22 A. Rick, I have no insight into your thinking or into Bill
23 Peartree's thinking in this matter.

24 Q. Jeff, are you aware that securities rules require the
25 securities company to tell clients when -- in advance who their

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1 adviser is going to be?

2 A. I am not aware of securities regulations, Rick.

3 Q. Jeff, back to that same email, going back a page on Item
4 No. 2, do you see there where I said: If someone says
5 something that's not true or omits material facts and efforts
6 to deceive the other party and/or solicit a desired action or
7 response, you stated I am not allowed to call this line, and
8 instead alluded I should use the term "crafting a story" or I
9 will be terminated?

10 A. Are you saying that I said this, Rick?

11 Q. Jeff, I'm saying do you see that?

12 A. I see it.

13 Q. Why would I send this email to you and Mara, and then later
14 on in this email I specifically ask you if this isn't the
15 understanding, please correct me?

16 A. Rick, I cannot explain your thinking.

17 THE COURT: In other words, do you recall saying that
18 during the meeting?

19 THE WITNESS: I absolutely did not say "craft a
20 story." I think Bill Peartree said craft a story, but I
21 don't -- I would never say to somebody, Don't say "lie"; say
22 "craft a story."

23 THE COURT: Okay. Next question.

24 BY MR. FERGUSON:

25 Q. Jeff, isn't it true -- and I agree with you. Isn't it true

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Calder - cross

1 that Bill Peartree did say, We need you -- Rick, we need you
2 to -- after we had discussed and I had pointed out that MMA
3 Securities had broke FINRA regulations by telling clients that
4 I was going to be their adviser, when they actually had planned
5 this whole time to move them to someone else, Bill Peartree
6 stated, Well, yes, that's true, Rick. We need you to craft a
7 story to help smooth this over with clients.

8 And Mara Crain jumped in immediately and said, I don't
9 think that's what Bill meant to say, and asked him to restate
10 his words.

11 A. Rick, I don't agree with your statement.

12 THE COURT: Well --

13 THE WITNESS: I don't know what the question was. He
14 made a statement without a question.

15 THE COURT: What did Ms. Crain -- when Mr. Peartree
16 used the phrase "craft a story," what, if anything, did
17 Ms. Crain say?

18 THE WITNESS: I don't think she said anything at that
19 point in time.

20 THE COURT: Did there come a time during the meeting
21 when she did say something?

22 THE WITNESS: I don't believe so. She was not
23 necessarily an active participant in the meeting. But I
24 guarantee you that if "craft a story" was -- if "craft a story"
25 was interpreted as make up a lie, Mara would correct that.

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Calder - cross

1 THE COURT: Okay.

2 Do you recall her ever saying words to the effect --
3 asking Mr. Peartree, Whoa, Bill, what do you mean by "craft a
4 story," or asking some other type of question like that?

5 THE WITNESS: I don't recall.

6 THE COURT: Okay. Next question.

7 BY MR. FERGUSON:

8 Q. Jeff, at the very end of that email, do you see where it
9 says: If you feel the company would prefer to retaliate
10 against me for being a whistleblower and terminate me for not
11 signing this letter, that I have clearly shown is not 100
12 percent correct, that is, of course, your right?

13 A. I see that.

14 Q. Do you see the next sentence: Please just respond to this
15 email clearly stating that I will be terminated if I don't sign
16 the letter as is, and I will sign it?

17 A. I see that as well.

18 Q. Jeff, when you got this email from me, I'm pointing out
19 everything I've stated in my testimonies, what was your
20 thought? Did you respond to this email?

21 A. I don't believe I did. I can't remember responding to it.
22 I think what I likely did with this is, Whistleblower, your
23 complaint we take very seriously. I know that we told you to
24 get in touch with compliance. We have a whistleblower line. I
25 have an app on my phone that you can directly access

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1 compliance. And if you have a whistleblower complaint, I can't
2 tell you anything that we take more seriously than that as a
3 business.

4 Q. Can you please turn to Exhibit 32.

5 My apologies. I'll go to 31 in the interest of time.
6 I'm trying to cut some things out.

7 Do you see this is a -- I'm sorry. Do you see this is
8 a declaration by [REDACTED], who at the time was the lead
9 person at our client [REDACTED]?

10 A. Yes.

11 Q. Do you see there on Item No. 3, where Mike says: Rick
12 Ferguson was not a part of any other agreements between
13 [REDACTED] and Marsh & McLennan Agency LLC for
14 any other services?

15 A. Yes.

16 Q. Do you see where it says: During 2018 into 2019, Rick
17 Ferguson -- can you see where it says on Item No. 4 --

18 MR. WICKHAM: Your Honor, can we get a question
19 please?

20 MR. FERGUSON: Counsellors --

21 THE COURT: No, well, the question is -- Mr. Calder
22 has to have some personal knowledge about some of these things.
23 So just reading it to him without asking a question isn't
24 substantive. In other words, if you want this particular
25 document to be before me, that's fine.

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Calder - cross

1 Well, let me first ask, do you know Mr. [REDACTED]?

2 THE WITNESS: I do not.

3 THE COURT: Have you seen this declaration before?

4 THE WITNESS: I have not.

5 THE COURT: Okay.

6 So, Mr. Ferguson, what's the question related to this
7 document? In other words, there are different things that I
8 think that you may want -- if there are things that you want me
9 to know, that's fine, you can point those out to me. But the
10 issue is what Mr. Calder can add in terms of his own testimony.

11 MR. FERGUSON: Understood, your Honor.

12 I'll withdraw it.

13 Mr. Calder knows this client well, but we're not going
14 to obviously get there today, so I'll just withdraw it.

15 THE COURT: Look, I don't mean to block you, but
16 what -- in other words, if you want to ask questions about the
17 client and Mr. Calder's knowledge of the client, that's fine.

18 MR. FERGUSON: No, your Honor.

19 THE COURT: Okay.

20 BY MR. FERGUSON:

21 Q. Jeff, can you please turn to Tab 13.

22 Do you see there, Jeff, where this is an email from
23 Jake Daly admitting that he forged my signature?

24 A. No.

25 Q. Page 2. Hi, Jake. Have you ever put my signature on any

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Calder - cross

1 form, letter, or anything?

2 Jake responds: I have not. I did ask you for a copy
3 of your signature before on a template for an RFP response, I
4 will certainly attest to that. However, I would never put your
5 signature on something that was related to a client, a fee, or
6 otherwise.

7 A. I see that.

8 Q. You don't feel that Jake was stating, Well, I have used
9 your signature before, but trying to clarify that, Well, I
10 didn't use it for anything important?

11 MR. WICKHAM: Objection. Foundation. Speculation.

12 THE COURT: I'll allow the answer to the question.

13 A. Our signatures are used routinely in responses to RFPs. We
14 don't sign every RFP. We take our signatures in template.

15 An RFP is a request for a proposal. You provide
16 information to the party requesting it. And there's usually a
17 cover letter document that goes with it. We have a template
18 that we use, and we use everybody's templated signature on
19 those documents.

20 THE COURT: Okay. But people are aware that an RFP is
21 going out?

22 THE WITNESS: Right.

23 THE COURT: Okay. Go ahead.

24 Q. So, Jeff, are you saying MMA kept and has a copy of my
25 signature on file for use on things like this?

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Calder - cross

1 A. I'm sure they do.

2 Q. Jeff, please turn to 32.

3 Do you see that this is an email from me to a client
4 telling them that I've just been informed they are being
5 changed to a client of Jeff Stephens and I have no choice or
6 say-so.

7 A. I see that.

8 Q. Jeff, can you turn to the next exhibit, 33. This is dated
9 Thursday, January 10, not long after that December 20th
10 meeting.

11 Do you see where I say: MMA management has made a
12 firm decision on this issue. Do you have time to discuss their
13 decision.

14 A. I see that.

15 Q. Doesn't this show that my understanding from our meeting
16 was that you instructed me to reach back out to clients and
17 tell them they had to choose between Jeff Stephens at MMA or go
18 with me somewhere else?

19 A. Absolutely not. I understand that is your interpretation
20 of the meeting. I'm sorry you misinterpreted it.

21 But as followup to this [REDACTED] email, [REDACTED] did
22 get a visit from Bill Peartree to attempt to keep their
23 business as an alternative to you. There were always
24 alternatives outside of Jeff Stephens. It was not, Take Rick
25 Ferguson or take your business away. Absolutely not. That was

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Calder - cross

1 your interpretation of it.

2 Q. Jeff, isn't it true, in that meeting, when you found out
3 that Bill Peartree had committed these violations and now we
4 had to help solve it, you said, Fine, reach out to the clients.
5 They have to take Jeff Stephens. If they don't, they are
6 fired; we don't need their business. Take them somewhere else.

7 MR. WICKHAM: Objection. Compound.

8 A. That is absolutely false.

9 I would never say that. I am not in a position of
10 authority to fire clients that we've worked so hard to
11 maintain. I did not say, You have to take Jeff Stephens or get
12 lost.

13 We had alternatives. We were ready to present
14 alternatives. And I can't believe that you misinterpreted it
15 that way, but I believe that's because you wanted to make sure
16 these clients could come to you in the future.

17 Q. Jeff, you said at that meeting on December 20th you went
18 into it thinking that it would be combative; correct?

19 A. Yes, I did.

20 Q. Why would it be combative if, per your earlier statement, I
21 had requested to step away from all these clients?

22 A. Because you'd been very clear that you were unhappy with
23 this. And you were very, very clear that you were unhappy; you
24 were clear that you thought we were taking your business away
25 from you; you thought that being moved off -- you said you

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Calder - cross

1 didn't want to be a fiduciary if you weren't being paid. We
2 were okay with that. We were going to code it over to Stephens
3 and give that alternative to the client. If they didn't want
4 that, we would find a different alternative.

5 But I did feel it would be a contentious meeting. I
6 felt that based on the history of the meetings I've had with
7 you. I rarely walked into a meeting with a representative from
8 HR.

9 Q. Jeff, you stated earlier and in these declarations that I
10 stated I did not want this position anymore. So why would I be
11 combative over it?

12 A. I have no idea.

13 Q. Jeff, can you turn to Tab 25? I'm sorry. Yes, 25.

14 Do you recognize this? This is Exhibit C from MMA's
15 submission, the contract that -- signed between MMA and myself,
16 February 1st, 2014?

17 A. Yes.

18 Q. Do you see the first page, the introductory page, towards
19 the bottom? And we've looked at this before. I'll summarize.

20 In consideration for your execution of the offer
21 letter and the nonsolicitation confidentiality agreement,
22 you'll receive a bonus in the amount of \$5,000, and that will
23 be paid February 28, 2014. And then next you will also, for
24 doing this, get an additional bonus set forth in Schedule A.

25 And if we turn to Schedule A, we see an additional

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Calder - cross

1 \$5,000 bonus to be paid July 30th, 2014.

2 A. I see that.

3 Q. Can you please turn to Exhibit 35?

4 A. Yup.

5 Q. Do you see the very first -- do you see these are my pay
6 stubs, as you stated; correct?

7 A. I didn't state that.

8 Q. I'm sorry. You're right. You didn't.

9 As MMA's position?

10 A. Pardon me?

11 Q. You see this is a pay stub from MMA to me?

12 A. I see that.

13 Q. And there's a special bonus -- this is for February 28th,
14 2014.

15 A. I see that.

16 Q. There's a special bonus of \$5,000 that was paid by February
17 28th, 2014?

18 A. I see it.

19 Q. Go to the next page please.

20 MR. WICKHAM: Your Honor --

21 THE COURT: What's the -- again, there are two
22 separate purposes that appear to be going on. But one is that
23 what we're here to get is Mr. Calder's testimony. And you
24 didn't ask a question, you're just pointing him to different
25 places. So it seems like that's not really for him, that

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Calder - cross

1 you're pointing it out so that I know it.

2 So what's the question related to this?

3 MR. FERGUSON: And I apologize, your Honor. Too much
4 build-up there.

5 Q. The next page. Jeff, can you explain why MMA didn't pay me
6 the bonus under this contract?

7 A. I cannot.

8 Q. Do you agree, by looking at the next page, which was July,
9 which we just saw there was supposed to be a bonus payment, it
10 was not paid?

11 A. I don't know that.

12 MR. WICKHAM: Objection. Foundation.

13 THE COURT: Do you have any understanding about why --

14 THE WITNESS: I don't. I know for sure that if a
15 bonus is owed, a bonus is paid. And if a bonus is owed and not
16 paid, it's a mistake, not intentional.

17 THE COURT: Okay.

18 Do you recall this ever being raised to you?

19 THE WITNESS: No.

20 THE COURT: Did Mr. Ferguson raise it to you? At any
21 point in time did he raise it during the December 20th meeting?

22 THE WITNESS: This is the first time I've heard of
23 this.

24 THE COURT: Okay.

25 All right. Next question.

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Calder - cross

1 BY MR. FERGUSON:

2 Q. Didn't you earlier say -- I'm sorry. Jeff, you said this
3 is the first time you've heard of it. Didn't you earlier say
4 that this had been a very long build-up; that there was
5 problems going back a long time with me?

6 A. Yes.

7 Q. That I had made a lot of complaints?

8 A. Yes.

9 Q. But this wasn't one of them?

10 A. This was not one of them.

11 Q. Jeff, can we go back to Exhibit 25. And under Exhibit A of
12 that document, I'm just trying to point out to you, Jeff, what
13 my income was supposed to be for 2014. And do you see on page
14 1 of 2 for Exhibit A --

15 MR. WICKHAM: Your Honor --

16 THE COURT: I guess I don't quite understand what the
17 relevance is to this proceeding of something from 20 -- I
18 understand the relevance of the contract and everything else.
19 But what is the relevance -- and I think --

20 MR. FERGUSON: Your Honor, I think I know a way just
21 to shortcut all my questions on this.

22 THE COURT: Okay.

23 Q. Jeff, isn't it true I was complaining from 2014 on, because
24 MMA withheld pay from me that was due to me?

25 A. When you first came to the bay area, you were complaining

JA3VMARHredacted

Calder - cross

1 that there was a bonus owed you from the previous year's client
2 service executive bonus.

3 We investigated that. I found out that was true. We
4 got that paid.

5 We have also had further disputes regarding your
6 contention of bonuses owed versus our view of bonuses owed. We
7 have paid -- unless there's a mistake in the 5,000 that I don't
8 know about, we have paid every bonus due. It is not our
9 business practice to not pay bonuses.

10 Q. Jeff, isn't it true that I was also complaining about not
11 just bonuses, but MMA just plain did not pay me per my
12 contract; they withheld money from me?

13 A. Yes, you were complaining about that, and I disagree with
14 your interpretation.

15 MR. FERGUSON: Your Honor, would it be appropriate for
16 me to continue with just -- given he says that I disagree with
17 you, or I can clearly show that MMA withheld paychecks?

18 THE COURT: But I guess the question is, though, how
19 is that relevant to this? In other words, what is the argument
20 that you're making that that is relevant to the issue of the
21 preliminary injunction, which relates to confidential
22 information, which relates to client information, which relates
23 to you leaving, and the allegation that you took information,
24 either through email or otherwise that the company alleges is
25 confidential, with you?

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Calder - cross

1 MR. FERGUSON: I see, your Honor.

2 THE COURT: In other words, I understand you may have
3 had a history -- there may have been a history between yourself
4 and the company; and you may say that there's a history behind
5 then, I guess, taking money away from you that you thought you
6 were due; and that you believed that that was happening again
7 at this December 20th meeting in 2018. I understand that.

8 But this isn't an employment -- in other words, there
9 may be -- you may have -- you may at some point assert some
10 sort of counterclaims relating to that you were constructively
11 discharged or whatever, but that's not the issue that's
12 currently before me.

13 MR. FERGUSON: Thank you, your Honor. I see the
14 difference now. I was trying to show that the differences
15 between MMA and I went back years related to pay, and that was
16 why on December 20th they wanted all this. But I can see that
17 is something for a different venue.

18 THE COURT: No, no. It's fine if you want to point
19 out that -- I don't know whether this is the point, that there
20 had been a history of you raising issues, and so that wouldn't
21 necessarily have been a surprise. And I understand that from
22 what Mr. Calder is saying and from your questions.

23 But let's move on.

24 MR. FERGUSON: Agreed.

25 Thank you, your Honor.

JA3VMARHredacted

Calder - cross

1 BY MR. FERGUSON:

2 Q. Jeff, can you please turn to Exhibit 18.

3 Do you see this is yet another contract between myself
4 and MMA?

5 A. I see that.

6 Q. Why is the date on this one December 23rd, 2014?

7 A. I see a document that says December -- or January 31st. Am
8 I on the wrong tab?

9 Q. I apologize. The date it's signed.

10 A. I don't have any idea.

11 Q. And do you agree that in the last paragraph, this, again,
12 just like the other one, calls out specifically for a
13 nonsolicitation and confidentiality agreement, for this to be
14 attached to this the same date?

15 A. Yes, I see that.

16 Q. Jeff, isn't it true that I refused to sign those
17 nonsolicitation agreements and confidentiality agreements
18 because they violated FINRA arbitration requirement? And the
19 reason some pages are missing is because I struck out pages
20 that I felt would violate --

21 A. I'm unaware of that, Rick.

22 Q. Can you please turn to Exhibit 19.

23 I'm almost done.

24 A. Did you say you're almost done?

25 THE COURT: Let's just take it one question at a time.

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Calder - cross

1 So, I'm sorry, so Exhibit 19?

2 Q. Jeff, does MMA West operate as an independent entity?

3 A. MMA West is part of MMA. We are not an independent entity.

4 Q. Do they hold themselves out as independent in any way?

5 A. No.

6 Q. Jeff, do you see there -- glasses.

7 Do you see there at the top of this website what the
8 website is?

9 MR. WICKHAM: Objection. Foundation.

10 THE COURT: Well, he's just asking does he see the
11 website. It looks like it's mma-west.com.

12 THE WITNESS: Yes, I see that.

13 Q. Jeff, can you turn to Exhibit 20.

14 Where is MMA West headquartered?

15 A. MMA West, main office is in San Diego.

16 Q. Jeff, can you please turn to Exhibit 39.

17 Jeff, do you see that this is an email between myself
18 and Pam Madrinan, January 13th, 2007?

19 A. Yes.

20 Q. Do you know when I was hired within Barney & Barney?

21 A. I don't.

22 Q. Wasn't it in February sometime?

23 A. I don't know.

24 Q. Can you turn to Exhibit 40.

25 Jeff, do you think it was appropriate for Pam and

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Calder - cross

1 myself -- for Pam to be asking me for pay things? We saw
2 earlier that Bill Peartree was asking me for clients and
3 prospects. The next few exhibits, all going back and forth,
4 prior to my being hired.

5 THE COURT: Do you know Ms. Madrinan?

6 THE WITNESS: I do know her, but I was not involved in
7 this process whatsoever.

8 THE COURT: Okay.

9 Do you know, Mr. Ferguson, is there a question -- in
10 other words, are you just asking -- you're asking to read it
11 and give his view?

12 MR. FERGUSON: I was going to ask a question. But if
13 his statement is he is not familiar with Pam Madrinan, then I
14 withdraw --

15 THE COURT: No, no, no.

16 THE WITNESS: That's not what I'm saying. I know Pam
17 Madrinan, but I am unfamiliar with anything related to this
18 correspondence. We were not part of Barney & Barney in 2007.

19 BY MR. FERGUSON:

20 Q. Do you agree it would have been -- would it have been
21 inappropriate for Barney & Barney to ask me the questions that
22 we've seen they are asking if I was not employed, or is that
23 just a normal part of hiring someone?

24 A. No, I have no idea what your former employer's status was.
25 I have no idea whether you had a noncompete. I'm totally

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Calder - cross

1 unversed in this, so I don't know.

2 Q. Jeff, can you please turn to Tab 43.

3 MR. FERGUSON: Your Honor, can I ask a question?

4 THE COURT: Yes.

5 MR. FERGUSON: I was getting ready to show exhibits.
6 Mr. Calder just stated that he was unfamiliar with what my
7 employer's position was. There's an email in here that shows
8 that MMA was fully -- or Barney & Barney was fully aware what
9 my position was. But really he doesn't know this, it's not
10 that --

11 THE COURT: Right. If you want to find out whether
12 he's seen a particular document, that's fine. But it doesn't
13 seem like -- at least from Mr. Calder's testimony, that he was
14 involved in this.

15 Do you remember him being involved in this?

16 MR. FERGUSON: No, I don't think he would have been
17 directly involved. But my understanding was that Bill Peartree
18 had, very in-depth, briefed him on this situation.

19 THE WITNESS: Absolutely not.

20 THE COURT: In other words, back in 2007?

21 MR. FERGUSON: When we were having -- this happened in
22 2007. It's obvious I was going back and forth with MMA or B&B
23 before I was hired.

24 THE WITNESS: Your Honor, our company merged with
25 Barney & Barney in 2008. I was not even part of the company.

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Calder - cross

1 MR. FERGUSON: So that's why I don't know if it's --

2 THE COURT: No, it's not. So let's move on.

3 BY MR. FERGUSON:

4 Q. Jeff, can you turn to Exhibit 45.

5 Do you see there at the top, where this is my U-4 form
6 registration with Resources Investment Advisors?

7 A. I see that.

8 Q. It shows the employment date is February 15th?

9 A. Yes.

10 Q. Does this show that I was not employed by Resources
11 Investment Advisors until after I left MMA?

12 MR. WICKHAM: Objection.

13 Foundation. Speculation.

14 THE COURT: Are you familiar with the U-4?

15 THE WITNESS: I am not.

16 THE COURT: Do you know -- when it says -- well, did
17 you fill this out, Mr. Ferguson?

18 MR. FERGUSON: No, this is filled out by Resources and
19 submitted to FINRA. This is a printout from FINRA.

20 THE COURT: Okay.

21 Well, filled out by Resources Investment Advisors?

22 MR. FERGUSON: Right, by the compliance department.

23 Only the compliance department can do a U-4.

24 THE COURT: Okay.

25 So do you have any understanding of what this --

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Calder - cross

1 THE WITNESS: I do not.

2 THE COURT: Okay. Next question.

3 BY MR. FERGUSON:

4 Q. Jeff, the next -- No. 45.

5 A. Go to 45?

6 THE COURT: Yes. That was the U-4.

7 Q. Oh, 46. Apologize.

8 Do you see this is my investment adviser
9 representative agreement with Resources. And on the last page
10 signed by myself and Resources, effective February 15th, the
11 same date?

12 MR. WICKHAM: Objection.

13 Foundation. Speculation.

14 THE COURT: Have you --

15 THE WITNESS: I have no knowledge of these forms, but
16 I see this one form was signed January 31st.

17 THE COURT: Yes. Appendix A and Appendix B.

18 THE WITNESS: Yeah.

19 MR. WICKHAM: 46. Okay. Yeah, so he was with them as
20 of January 31st of 2019.

21 THE COURT: Well, look --

22 MR. WICKHAM: Signing them.

23 THE COURT: Signing them. Okay.

24 Q. Jeff, does this show --

25 MR. WICKHAM: While he's still employed by MMA.

JA3VMARHredacted

Calder - cross

1 BY MR. FERGUSON:

2 Q. But doesn't this show that the same things that MMA and B&B
3 had me do, are the same things that Resources had me do?

4 A. I don't think so. I have no knowledge of that.

5 THE COURT: Well, I mean a couple of things.

6 Well, let's move -- I think it's irrelevant. In other
7 words, the old adage two wrongs don't make a right, if that's
8 what you're claiming, and I don't know -- I have no idea
9 what -- the issue is -- and certainly the issue may be when you
10 started at another -- when your effective date of employment
11 was at a new employer.

12 But I think the allegation is not necessarily that you
13 were employed at the time, but that you had started already
14 soliciting clients for that new position. And I understand
15 that the disagreement is there. So let's move on to the next
16 question.

17 BY MR. FERGUSON:

18 Q. Jeff, did you earlier testify that MMA has very strong
19 security, and that any emails sent out, like I did, would
20 trigger a security compliance trigger of some type?

21 A. Yes, I did.

22 Q. Did the emails that I sent out, did they trigger compliance
23 alerts?

24 THE COURT: I think we have to be a little bit more --
25 what new emails are we talking about?

JA3VMARHredacted

Calder - cross

1 MR. FERGUSON: Your Honor, I think I have no more
2 questions for the witness. I think it's better saved for my
3 testimony.

4 THE COURT: Okay. Any redirect?

5 MR. WICKHAM: No, your Honor.

6 THE COURT: Okay.

7 All right. Thank you, Mr. Calder.

8 (Witness excused)

9 THE COURT: Okay. Mr. Ferguson, you are up.

10 Remain standing for a moment; my deputy clerk will
11 swear you in.

12 ELMER "RICK" FERGUSON,

13 called as a witness on his own behalf,

14 having been duly sworn, testified as follows:

15 THE COURT: Mr. Calder -- I apologize. Mr. Ferguson,
16 as we discussed yesterday, since you're proceeding *pro se*, like
17 I said, I would allow you to testify in narrative, with the
18 understanding that I may interject and ask you questions.

19 In addition, if I think -- I may, in an effort to --
20 so why don't we begin there. I'd like you to keep in mind the
21 affidavit you already submitted, as I mentioned, as well as the
22 exact nature of these proceedings.

23 THE WITNESS: Your Honor, can I grab my --

24 THE COURT: Oh, sure, you should absolutely bring your
25 binder up.

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Ferguson - direct

1 THE WITNESS: I forgot one thing. I apologize. I
2 forgot two things.

3 DIRECT EXAMINATION

4 BY MR. FERGUSON: Your Honor, I respectfully request
5 the Court to take judicial notice of a FINRA case,
6 my Exhibit 10.

7 THE COURT: Okay.

8 MR. FERGUSON: *FINRA v. Merrill Lynch*, Letter No.
9 2009020188101. This is the FINRA determination and letter of
10 acceptance, waiver, and consent filed pursuant to FINRA Rule
11 9216 of FINRA's Code of Procedure to settle rule violations
12 alleging that Merrill Lynch structured corporate entities and
13 agreements specifically without arbitration clauses, as
14 required for FINRA persons and firms, and used those agreements
15 to file legal actions against FINRA registered persons in civil
16 court, federal civil court, in such a way as to purposely avoid
17 FINRA oversight, the same situation we have here today.

18 THE COURT: All right. Mr. Ferguson, do you know
19 whether this was cited by your counsel in the papers?

20 THE WITNESS: I just became aware of this, your Honor.

21 THE COURT: Okay. Well, I don't have a problem --
22 well, let me ask, putting aside whether or not you say it's
23 relevant, do you have any reason to doubt that this is a FINRA
24 waiver and consent? And I understand the issue that you may
25 not believe it's relevant.

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Ferguson - direct

1 MR. WICKHAM: You know, your Honor, I don't have any
2 reason to believe --

3 THE COURT: I'll take it subject to any objection you
4 may have with regard to its authenticity. The impact it has on
5 me, first of all, it's a different firm, it's not a district
6 court decision, it's not a Second Circuit decision, it is an
7 interpretation by FINRA. However, that's the issue that I'm
8 here to decide, in other words, whether or not this is -- well,
9 one of the motions in whether or not --

10 MR. WICKHAM: Merrill Lynch is a regulated entity;
11 it's a broker-dealer. MMA is not a broker-dealer; it's not a
12 regulated entity. So I can understand the gist of this, that
13 FINRA would say that a broker-dealer, a regulated entity, can't
14 do an end-run around their FINRA regulations.

15 In our situation, it's entirely different, because MMA
16 isn't a regulated entity; they are not doing an end-run around
17 anything. And the cases that are cited back and forth deal
18 with that situation in the respective parties' briefs.

19 MR. FERGUSON: Counsellor --

20 THE COURT: No, no, no. Because I'm doing it -- with
21 regard to this document -- I understand the arguments on both
22 sides.

23 MR. WICKHAM: Thank you, your Honor.

24 THE COURT: If you want to -- I'll consider this
25 document subject to any objections about that it isn't what it

JA3VMARHredacted

Ferguson - direct

1 purports to be.

2 MR. WICKHAM: Thank you, your Honor.

3 MR. FERGUSON: Thank you your Honor.

4 Your Honor, Mr. Wickham spent hours of time at my
5 deposition covering emails I sent from my MMA email.

6 Mr. Wickham spent considerable time yesterday covering those
7 emails again. MMA has made a very large deal out of those
8 emails sent. The only issue is that at no time have I ever
9 denied sending those emails.

10 I have been working in investments for 20 years. I
11 have FINRA registration 76366 and 24. A Series 24 is FINRA
12 general principles, securities principle, means I can supervise
13 other registered persons and act as a compliance officer.

14 I'm not an attorney, but I do know at least something
15 about the regulations of my industry. To my knowledge, I am
16 not below average intelligence. MMA has stated that they have
17 extremely tight security, whereby any emails sent to an outside
18 party, like I did, triggers a compliance alert.

19 I sent an email as early as December 20th, 2018,
20 stating I could not state at my job under the change proposed
21 by MMA that we discussed. I sent multiple emails over a period
22 of months to many different people at MMA and MMAS stating that
23 I was contacting clients to discuss a choice, as instructed,
24 between Jeff Stephens at MMA or go somewhere else.

25 I sent emails regarding a different firm directly from

JA3VMARHredacted

Ferguson - direct

1 my MMA email account that I knew was heavily monitored, and
2 even more so at that time, per Diane Rosen's email that we've
3 seen. I sent an email to Jeff Calder and Mara Crain again
4 stating I was reaching out to my clients. And I even asked
5 them to clarify that understanding.

6 I sent 13 years worth of my contacts to myself
7 directly to my new company address, over 3,400 contacts, of
8 which less than 100 were actual client or prospect contacts.

9 I cleaned out my office in January in full view of
10 everyone. My office is located right next to the break room.
11 Everyone saw it.

12 MMA cannot plausibly deny they were not aware of what
13 I was doing. MMA cannot plausibly deny they knew what my
14 understanding of Jeff Calder's instructions from that December
15 20th meeting were. MMA cannot plausibly deny that they had
16 every chance to correct my understanding and stop all these
17 actions. But they didn't. Common sense shouts that something
18 is wrong with MMA's stated viewpoint of events.

19 THE COURT: You were sent at some point a cease and
20 desist, right?

21 THE WITNESS: But that was after all of this.

22 THE COURT: Well, after in February --

23 THE WITNESS: February 19th.

24 THE COURT: Well, I thought the initial one -- well,
25 in any event, I'm sorry, I interrupted you.

JA3VMARHredacted

Ferguson - direct

1 MR. WICKHAM: Mr. Calder testified that as soon as he
2 heard from [REDACTED] that Mr. Ferguson was engaged in this
3 activity, he sent a cease and desist email that same day on
4 February 14th.

5 THE COURT: Yes.

6 THE WITNESS: 14th, after all of this. Months and
7 months I had been doing this and I hadn't denied it.

8 THE COURT: Here's the issue: So you're saying -- is
9 the argument that you're saying, Well, it's really just a
10 pretext, they knew, and this was the plan all along and they
11 are changing their story now?

12 THE WITNESS: Exactly, your Honor. I was following
13 instructions by MMA. Under estoppel, they can't now bring
14 these complaints against me for doing what they instructed me
15 to do and clearly knew I was doing it.

16 THE COURT: Okay. But did they instruct you to -- we
17 saw certain exhibits related to -- I know there's an argument
18 about whether or not it's confidential. But were there
19 instructions that you should email to yourself information
20 related to the compensation received by MMA from various
21 clients?

22 THE WITNESS: Your Honor, I didn't see this as
23 confidential information. As we've seen, I work under
24 securities rules. The entire time, as all the exhibits have
25 shown, I thought I was supposed to be doing this. I didn't

JA3VMARHredacted

Ferguson - direct

1 hide anything. I thought it was okay to do this because Jeff
2 Calder had instructed me to.

3 As a matter of being adults and being professionals,
4 Rick, we want you to do this. I'm not going to ask him every
5 step of the way. I know what I need to do to transfer my
6 clients.

7 THE COURT: Although the -- okay. I think I
8 understand.

9 So basically, what you took away from that, the
10 meeting on December 20th, is that the contact you were to have
11 with your clients were to discuss with them whether or not they
12 were going to -- not the transition from over to MMA Securities
13 and Mr. Stephens, it was a transition -- well, yes, that, or
14 come with me.

15 THE WITNESS: Correct, your Honor.

16 THE COURT: All right. Go ahead.

17 MR. FERGUSON: I did not benefit from being fired from
18 MMAS, MMA. I received no transfer bonus or any other bonus
19 that MMA seems to think I received. This was the subject of a
20 significant amount of discovery requests and a significant
21 amount of time during my deposition, but the facts are there
22 just isn't any. I make less money now since I was fired. This
23 situation has been a lose, lose, lose for me.

24 All MMA and MMAS systems and laptops are backed up to
25 centralized services, so I didn't destroy anything. In fact, I

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Ferguson - direct

1 printed off all information that was localized to my laptop to
2 the MMA printer in San Francisco so MMA and MMAS would have a
3 copy of it. I did all that before I deleted the information
4 from my laptop, as I had previously been instructed to do,
5 before turning it in by MMA IT person Adrienne Hilborne.

6 Jeff Calder fired me and told me on February 14th,
7 2019, I was never allowed in an MMA office again. I sent in my
8 confused resignation the next day, February 15th, 2019, and
9 waited for a reply on how to return my company laptop.

10 Mara Crain finally responded to me on February 21st,
11 six days later. She sent another email the very next day. I
12 had started suspecting that MMA had intentionally set me up to
13 be fired, with this entire taking-my-book/Jeff-Stephens-last-
14 warning situation, telling me to do these things and now coming
15 after me for them.

16 So I informally asked an attorney friend, whom
17 suggested I respond as I did. This only took one day, and I
18 think one day is warranted, given that I had been blindsided by
19 MMA firing me for following their instructions.

20 Mara Crain did not respond to me for four more days.
21 When she finally did on February 25th, I returned the items
22 immediately that same day. MMA cannot plausibly state I
23 refused to return these items, when all ten days of the delay
24 were purely on the part of MMA.

25 One of the questions of this matter is should New York

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Ferguson - direct

1 or California law apply regarding the nonsolicitation and
2 confidentiality agreement, which I testify I didn't sign due to
3 it not having the required FINRA arbitration clause. Besides
4 the fact, MMA has submitted a document to the Court that they
5 knew was not the correct document --

6 THE COURT: I'm sorry, which document?

7 THE WITNESS: The nonsolicitation and confidentiality
8 agreement that, your Honor, you noticed was not original, and
9 then counsel admitted that they pulled pages from other
10 documents.

11 I respectfully ask the Court to also take --

12 THE COURT: So just so I'm clear on this, are you
13 saying that with regard to that document, that it's your
14 signature, but you had crossed out that page?

15 THE WITNESS: Correct, your Honor.

16 The reason they can't provide a true and complete
17 copy, as we've seen, I was constantly complaining that MMA and
18 MMAS were violating compliance regulations. By signing that, I
19 noticed there's no arbitration agreement; it has to be in
20 there, so I had crossed out pages, missing pages. We see there
21 was no agreement -- from the other agreements that were dated
22 later, there's no nonsolicitation and confidentiality
23 agreement.

24 I constantly was telling MMA and MMA Securities, I
25 can't sign something that is against FINRA regulations.

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Ferguson - direct

1 THE COURT: When you say you were constantly saying
2 that, besides the striking out of portions of contracts and the
3 like -- first of all, did you retain any copies where you
4 struck out these portions?

5 THE WITNESS: No.

6 THE COURT: Did you send any emails contemporaneously
7 saying, Thank you for sending me this document. You'll
8 note I've struck -- in other words, any contemporaneous emails
9 saying that you're not going to sign it because you believe it
10 violates FINRA?

11 THE WITNESS: No, your Honor. Most of these were done
12 in person very quickly, where MMA would come to me and say, You
13 need to sign this right now. And --

14 THE COURT: Well, but -- all right. But isn't that --
15 you need to sign this right now, but you took the time to look
16 at it to know that it had these provisions in it to strike it
17 out.

18 THE WITNESS: An arbitration clause is -- because I
19 deal with them in all my contracts, it's very obvious to me.

20 THE COURT: All right. So you struck it out.

21 What was the response? I mean you're standing there.
22 You said it was in person. First of all, who presented you
23 with these?

24 THE WITNESS: I believe Bill Peartree presented me
25 with one, Jeff Calder presented me with one, Mara Crain. But I

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Ferguson - direct

1 can't be exactly certain who on each one.

2 THE COURT: All right.

3 And so you struck it out. What was the reaction when
4 you struck it out? You signed the end and you struck it out.
5 So --

6 THE WITNESS: I would agree with Jeff Calder's
7 testimony, MMA and I have had a very contentious relationship
8 the last five years because of things like this.

9 THE COURT: No, no. But this is starting your
10 employment, right? In other words --

11 THE WITNESS: They accepted it.

12 THE COURT: Well, then that's the question. So you're
13 saying they had no reaction, they just -- you struck it out and
14 they were okay with it?

15 THE WITNESS: No. But if I refused to sign it --
16 that's ongoing -- that's why I ended up with a final warning,
17 is -- and I refused to sign that as well.

18 THE COURT: I thought that one of the agreements that
19 you were saying was --

20 THE WITNESS: I signed the agreement and I handed it
21 in.

22 THE COURT: No, no. But that was from the -- I
23 thought that was from your initial -- from 2/1 of -- I thought
24 that was an initial employment agreement.

25 THE WITNESS: That was the very first one; that was

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Ferguson - direct

1 with Barney & Barney. That did not have a separate
2 nonsolicitation and confidentiality agreement.

3 THE COURT: That's okay. Why don't you continue. I
4 don't have the document in front of me.

5 But the document that I was referring to, where, I
6 think, Mr. Wickham said that a page was inserted, wasn't that
7 an initial agreement?

8 THE WITNESS: I see. Remember it was Barney & Barney
9 first. MMA bought them February 1st, 2014.

10 THE COURT: And that's --

11 THE WITNESS: That's the agreement.

12 So that one, yes, that's the one where the pages are
13 missing.

14 THE COURT: So you're saying that at that point, when
15 you were presented with this -- do you remember whether that
16 was Mr. Peartree who presented it to you or someone else?

17 THE WITNESS: It was either Mr. Peartree or
18 Mr. Calder, but I don't remember which.

19 THE COURT: Okay.

20 So that's presented to you. You recognize that
21 there's confidentiality in there, and so you strike it out.
22 And there was no reaction? They just accepted it?

23 MR. WICKHAM: He struck out the arbitration clause,
24 not the confidentiality clause.

25 THE COURT: I'm sorry, yes, the arbitration.

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Ferguson - direct

1 THE WITNESS: Well, there was no arbitration. So the
2 part of remedy, there's a part that you've replaced is the part
3 of remedy.

4 MR. WICKHAM: The liquidated damages provision.

5 THE WITNESS: Correct. But you can't do -- there has
6 to be -- first it has to go to FINRA arbitration.

7 THE COURT: Wait a second.

8 As I understand the document that was the MMA -- not
9 the securities, there was no arbitration provision in there and
10 it was the confidentiality provision that you were striking out
11 because -- well, let me ask, what was it that you were -- well,
12 do you know what -- what's the document? Why don't we look at
13 the document. I don't remember --

14 MR. WICKHAM: It's Plaintiff's Exhibit 3, your Honor.

15 THE COURT: All right.

16 Do you have the plaintiff's exhibits there also?

17 THE WITNESS: I do. Oh, well, I have it.

18 THE COURT: What is it in your binder?

19 THE WITNESS: I have it in my binder. It's Tab 32.

20 MR. WICKHAM: Pardon me? Do you have the one that --

21 THE WITNESS: I used your exhibit.

22 MR. WICKHAM: Okay. Good.

23 What's your exhibit number?

24 THE COURT: It's No. 3.

25 THE WITNESS: 3.

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Ferguson - direct

1 THE COURT: So, right, this is Exhibit 3, this is the
2 initial employment agreement when --

3 THE WITNESS: Correct.

4 THE COURT: -- Barney & Barney was being -- becoming
5 part of Marsh. And I know that's not the correct terminology.

6 And so, as I understand it, what page or what things
7 did you cross out or take out in connection with this
8 agreement?

9 THE WITNESS: And, your Honor, to the best of my
10 recollection, when I looked at this, you see it goes, as you
11 pointed out, page 1, page 2, page 3, page 4. Page 5 is
12 completely different. Then there's page 6, then it goes to
13 page 7. But then there's another page 7. There's more than
14 one page that has been replaced in this document.

15 THE COURT: All right. So first of all, what did you
16 recall -- what was page 5, if it wasn't --

17 THE WITNESS: So page 5, as I'm looking at this, I
18 mean this is what caught my attention immediately, is anything
19 that says liquidated damages and goes into that, for a
20 FINRA-associated person, I can't agree to that unless there's
21 an arbitration.

22 THE COURT: So do you remember one way or the other
23 whether you struck anything from the initial agreement? In
24 other words, you're saying you think this was inserted after
25 the fact. But do you recall objecting at the time to anything

JA3VMARHredacted

Ferguson - direct

1 contained in the document that's Exhibit 3?

2 THE WITNESS: Yes, your Honor. Counsel has already
3 admitted that they inserted this after the fact.

4 THE COURT: No, no, I understand that.

5 But I'm trying to --

6 THE WITNESS: What was originally on here?

7 THE COURT: Correct. In other words, you presented
8 with it and you signed a document because you -- right, this is
9 your -- the corrected on the last page, page 9, that's your
10 signature, right?

11 THE WITNESS: Correct.

12 THE COURT: All right.

13 So do you recall when you signed the document, were
14 there provisions that were in this document that you basically
15 struck as an indication that you weren't agreeing to that?

16 THE WITNESS: And I can say yes, your Honor, that I
17 don't know exactly -- I don't have a copy of it, of what the
18 original agreement said, but I can testify that just looking at
19 this document, the liquidated damages, I would have struck
20 that. So it's probably the same thing that I struck earlier.

21 THE COURT: Okay. Well, when you say -- well, the
22 question is do you recall striking anything at the time?

23 THE WITNESS: Yes.

24 THE COURT: Not later on having reviewed it and
25 saying, Oh, I probably wouldn't have signed this because of

JA3VMARHredacted

Ferguson - direct

1 FINRA. In other words, you recall, when you got this, striking
2 out certain provisions?

3 THE WITNESS: Yes, your Honor.

4 THE COURT: All right.

5 And which provisions do you recall striking out?

6 THE WITNESS: I don't have the original document, so I
7 don't know exactly what I struck out, because I would have to
8 see the original one.

9 THE COURT: Well --

10 MR. WICKHAM: The liquidated damages provision is the
11 same, it just -- it's the same language. So if that's what
12 he's referring to, then he's referring to paragraph 7.

13 THE COURT: I guess the question is do you have any
14 recollection of what provisions that you struck out? Putting
15 aside that you don't have the original agreement, right, do you
16 recall at the time what things you struck at the time?

17 THE WITNESS: I don't recall exactly, but I recall
18 that it was something about the damages. That I cannot agree
19 as a FINRA person -- and that's in FINRA regulation, I can't
20 agree to anything that stipulates damages without going to
21 arbitration first.

22 THE COURT: Okay. All right.

23 So you think it was the damages provision, and that's
24 why this page 5 was inserted in here, because you believe you
25 struck it out at the time?

JA3VMARHredacted

Ferguson - direct

1 THE WITNESS: Correct. I'm not arguing with counsel
2 that whether this may or may not be an actual accurate
3 representation of what the agreement was originally done, but I
4 do know that I struck out certain parts when this was
5 originally presented to me. And they were the parts about
6 damages.

7 THE COURT: Okay.

8 But there are no contemporaneous emails relating to
9 that?

10 THE WITNESS: No, your Honor. If there are, MMA would
11 have them.

12 THE COURT: And it's your testimony that even though
13 you struck out portions of the contracts which -- that MMA was
14 okay with you coming on board and having you work for them?

15 THE WITNESS: Correct, your Honor. There are often
16 changes to agreements.

17 One of the things that happened between --

18 THE COURT: We'll take a break in a second for the
19 conference.

20 I'm fully aware that there are often changes to
21 agreements. But an employment agreement -- well, I don't want
22 to get into it, but this is a fairly standard agreement. I
23 think it was presented to other employees who were making the
24 transition. Everyone else, I would imagine, probably signed
25 it. So it's not a small issue when someone strikes a contract.

JA3VMARHredacted

Ferguson - direct

1 So this isn't quite like when you sign a -- when you're going
2 to get an apartment and you're signing a standard lease. I
3 would imagine if you started striking out things, that there
4 would be a discussion that would happen.

5 But what you're testifying to is that you struck it
6 out, there was no discussion, and they just --

7 THE WITNESS: I apologize if that's the impression
8 I've given, your Honor. No, that's what I mean when I've said
9 MMA and I have had lots of discussion about these things.

10 THE COURT: About this, about FINRA.

11 THE WITNESS: At the time, yes, there were discussions
12 about it.

13 THE COURT: Where are the emails?

14 THE WITNESS: Yes, that's -- when I say -- when I
15 said -- testified that MMA had a lot of problems with me
16 because I kept bringing up FINRA compliance violations, this
17 was --

18 THE COURT: Where are the emails that show
19 contemporaneously you were bringing up the fact that you
20 believe that MMA or MMA Securities, whatever, was violating
21 certain FINRA rules?

22 THE WITNESS: Your Honor, besides what I've shown
23 today, I wouldn't have them. MMA would have them, because they
24 were all on their servers.

25 THE COURT: So I guess what I would ask is you've

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Ferguson - direct

1 been -- as I understand it, you forwarded various -- you admit
2 that it was a contentious relationship over time; and yet you
3 never thought to copy, print out these emails relating to FINRA
4 that over the years, since 2014, that you were having these
5 disagreements back and forth? You never did that?

6 THE WITNESS: I printed some of them out. Those have
7 been my exhibits that I've put here.

8 THE COURT: All right. Okay.

9 I'm sorry. Go ahead.

10 Well, actually, I need to take a break to handle two
11 conferences that I mentioned. So if I could ask you to step
12 down for a moment.

13 (Witness stepped down)

14 (Recess)

15 MR. FERGUSON: So, your Honor, we were discussing
16 which parts would be likely to be struck out, what I've done
17 and what I've kept in the documentation.

18 And I apologize, your Honor, I wasn't ignoring you
19 while you were talking to me. I was frantically trying to
20 find -- because I knew there was an example of it in my
21 exhibits.

22 THE COURT: Okay.

23 THE WITNESS: Exhibit 52.

24 So right before MMA purchased Barney & Barney --

25 MR. WICKHAM: Sorry, is that 52?

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Ferguson - direct

1 MR. FERGUSON: 52.

2 THE COURT: Five two.

3 THE WITNESS: MMA purchased Barney & Barney February
4 1st, 2014. Right before that, you see this was an agreement
5 that was presented to me by Barney & Barney, producer
6 agreement, the 13th day of August 2013. And you can see there,
7 your Honor, while on page 3, all the strikeouts. And I do have
8 the Word version of it. While I didn't keep every document --
9 and I should have, I realize that now -- this is one of the
10 ones that I kept. And you can see there I struck out
11 liquidated damages, other remedies.

12 And my comments that I gave back to Barney & Barney:
13 Really? This seems rather preemptively punitive. Agreement to
14 mediation at most would be more acceptable. I was quoting and
15 telling them that they needed to follow FINRA regulations for
16 agreements with me.

17 THE COURT: That's not what it says.

18 THE WITNESS: Arbitration.

19 THE COURT: Well, no, but what it says is, right, it
20 doesn't cite to FINRA; it just says you think it's draconian,
21 it's punitive, and you think mediation would be the better way
22 to go.

23 THE WITNESS: Correct. Because that's required by --
24 and I apologize, it's by reference. The way my thinking always
25 is, I work under MMAS, so I'm always subject to FINRA rules and

JA3VMARHredacted

Ferguson - direct

1 regulations.

2 THE COURT: Okay. All right.

3 I'm sorry. Go ahead.

4 MR. WICKHAM: I'm sorry, your Honor. He just said
5 that he was under MMAS. The exhibit that he just went through
6 was in 2013.

7 THE COURT: Yes, no, I recognize --

8 MR. WICKHAM: It's before the acquisition.

9 THE COURT: Yes. He was just pointing out, because I
10 had asked questions whether he had kept any or had any examples
11 of him objecting to certain portions of the agreement. So I
12 think that he was pointing that out. I don't think he was
13 saying that this is -- well, it wasn't about --

14 MR. WICKHAM: Thank you, your Honor.

15 MR. FERGUSON: I stand corrected. SagePoint
16 Financial.

17 THE COURT: All right.

18 MR. FERGUSON: Okay. So moving on.

19 Your Honor, I respectfully request the Court also take
20 judicial notice of this in-depth discussion that I just found
21 very recently and I just printed it off.

22 THE COURT: Oh, have you provided a copy to --

23 THE WITNESS: No, but it's from a very respected and
24 well-known law firm that I don't think that they will
25 challenge.

JA3VMARHredacted

Ferguson - direct

1 MR. WICKHAM: Your Honor, I'm not sure the relevance
2 of this.

3 THE COURT: Same thing with the other document. I'll
4 take it -- obviously I would imagine that there are legal
5 arguments made in this document. It's probably some sort of
6 client notification thing.

7 So I'll take it subject to any argument. Again, it's
8 not -- I'll just take it, rather than engaging in a
9 back-and-forth relating to it. So we'll mark it -- why don't
10 we mark it Defendant's Exhibit -- looks like your exhibits go
11 up to 67, but why don't we, just to be on the safe side, make
12 it Defendant's Exhibit 70, subject to any objection. Okay.

13 THE WITNESS: Your Honor, can I respectfully explain
14 the significance? It relates to my testimony.

15 THE COURT: Okay.

16 THE WITNESS: That is a paper written by Littler on
17 California Labor Code, Provision Section 925, that if an
18 employee chooses to void a nonconfidentiality and noncompete
19 clause, which, of course, I wouldn't do, that it's allowed,
20 that the California law allows it, that an employee who is
21 primarily in California, works in California --

22 MR. WICKHAM: Your Honor, I'm going to object to him
23 getting into a legal discussion. He's not a member of the
24 bar --

25 THE COURT: Whoa, whoa, whoa.

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Ferguson - direct

1 MR. WICKHAM: -- he's misconstruing the argument --

2 THE COURT: Enough. Enough. Enough. Okay?

3 He's proceeding *pro se*. And yes, he's not a member of
4 the bar, but he's entitled to argue his case.

5 Don't roll your eyes at me, counsel. Do not do that.
6 All right?

7 MR. WICKHAM: I apologize, your Honor.

8 THE COURT: Look, I understand what you're saying.
9 And I'm not going to allow legal argument at this point because
10 that's part of the papers. If it relates to your testimony --
11 I understand that there's a legal argument that California law
12 applies, and that's one of the things that I'm being asked to
13 rule on. And that you're referring me now to Section 925,
14 which you say, under California law, allows you to strike out
15 various things. I get it. That's a legal argument. We're
16 here to discuss the facts.

17 Next.

18 MR. FERGUSON: Understood, your Honor.

19 THE COURT: And I apologize for snapping at you, but
20 if we engage in a back-and-forth, we're going to be here all
21 day.

22 Go ahead.

23 MR. FERGUSON: Can I just include, my testimony is my
24 contract was materially changed. By the testimony we've heard
25 here today, Jeff Calder did testify that effective November

JA3VMARHredacted

Ferguson - direct

1 1st, 2018, MMA significantly altered my pay structure, gave me
2 a raise; they significantly changed my contract in that I was
3 no longer in a hybrid role, I was only supposed to be in a
4 service role.

5 THE COURT: But I guess what are you -- as I
6 understand it, that was something that was going forward. Was
7 there a written agreement that was presented to you?

8 THE WITNESS: MMA has it. I do not have a copy of it.

9 THE COURT: Did you accept that? As I understand it,
10 you didn't accept it and -- in other words, there was -- on the
11 one hand you say that you were fired, constructively
12 terminated; but on the other, there is a resignation letter.

13 Where is it that you accepted whatever the offer was?

14 THE WITNESS: That was on November 1st, 2018, and only
15 MMA has a copy of it.

16 THE COURT: No, but did you sign it?

17 THE WITNESS: Yes, your Honor.

18 THE COURT: Okay. And what are you saying about that
19 agreement? What is the impact of that agreement?

20 THE WITNESS: I would just note that as your Honor
21 reads that, there was a material change to my contract,
22 November 1st, 2018.

23 THE COURT: Okay. Again, I don't know if that's part
24 of the documents or not, whatever the agreement is.

25 Do you have a sense, Mr. Wickham? Have you ever seen

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Ferguson - direct

1 a --

2 MR. WICKHAM: They have a compensation plan for client
3 executive service. His compensation plan for client executive
4 service, I'm looking for it, I believe it was signed in 2015.
5 It has the terms that Mr. Calder previously had described in
6 terms of base salary and then this bonus, one-time bonus based
7 on origination.

8 I'm not sure that -- what he's referring to about
9 another agreement. I don't believe there's another agreement.
10 But his compensation went up. He was at whatever, 85, 95, or
11 something like that. He then had said he wanted a raise. They
12 went back and forth. His compensation -- his salary first was
13 increased to 115. His salary was then increased up to 125
14 around this time period.

15 So that might be what he's referring to. I'm not
16 aware of another agreement, your Honor.

17 THE COURT: Okay. I just want to make sure that if
18 there is something, that I just have it before me. But that's
19 the only --

20 MR. WICKHAM: I'm looking for the most recent one.

21 THE COURT: All right.

22 Mr. Ferguson.

23 MR. FERGUSON: I did not and have not disparaged MMA.
24 In fact, I gave them compliments, as we saw in some of the
25 exhibits they presented yesterday. I had even referred them a

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Ferguson - direct

1 health and welfare client within a month or two after being
2 fired, [REDACTED]. I referred them that business.

3 Right after I was fired, I told them they were in
4 danger of losing a health and welfare client, because that
5 client, when I spoke with them in February/March, had told me
6 they were happy I left MMS/MMA, because they were not happy
7 with MMA's health and welfare services that they were currently
8 using. MMA has been able to retain that client because I told
9 them they needed to step up their game. I made sure that they
10 retained that.

11 I have repeatedly stated to any persons, clients,
12 prospects, or anyone else, that MMA is a good company with good
13 people.

14 MMA will not benefit from -- your Honor, are we going
15 to do closing statements?

16 THE COURT: Well, I think we're going to have to see
17 how much time that we have.

18 MR. FERGUSON: MMA will not benefit from this
19 restraining order or injunction. I cannot realistically
20 approach any of my old clients after MMA has poisoned them
21 against me like this; the damage is already done as we've seen.
22 Both MMAS, MMA, and I have suffered and it's time to move on
23 I've stated as much in one of my offers of settlement when I
24 agreed I wouldn't contact even my old clients. As we've seen
25 from the client response exhibits, both of our testimonies,

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Ferguson - direct

1 there's just no point in it. We'll both end up losing more.

2 MMA alone makes almost a billion dollars in revenue
3 per year. To think that my measly 600,000 book of business is
4 enough concern for a Fortune 500 conglomerate to spend hundreds
5 of thousands in legal fees, hiring attorneys, man-hours, the
6 time, the trouble, it just isn't realistic.

7 This is a personal vendetta against me and a coverup
8 to try and bury me so I won't or I can't file discrimination
9 and lost wages sued against them in California and/or a FINRA
10 action for MMA acting as an unregistered broker-dealer, as it
11 has obviously been doing.

12 On the other hand, an injunction and restraining order
13 barring me from working with clients who knowingly, and
14 informed with all pertinent information, chose me, will cause
15 me to have no income, go out of business, probably have to find
16 another profession, given MMA's continued disparaging of me in
17 our business community.

18 It will, more importantly, deprive my clients and
19 prospects of their freedom of choice. These companies made a
20 conscious, informed choice between MMAS, myself, or any other
21 adviser company, as we've seen, a decision that was forced by
22 MMA by their own actions. Why should those companies'
23 employees be deprived of their freedom of choice just because
24 MMA has a personal grudge against me.

25 THE COURT: Anything else with regard to backstory?

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Ferguson - cross

1 So, for example -- well, let me ask, is there any other factual
2 testimony?

3 MR. FERGUSON: No. I'll take questions.

4 THE COURT: All right.

5 Mr. Wickham, cross-examination.

6 MR. WICKHAM: Thank you, your Honor.

7 THE COURT: You can remain seated.

8 MR. WICKHAM: I'll keep it brief.

9 CROSS-EXAMINATION

10 BY MR. WICKHAM:

11 Q. Mr. Ferguson, starting with the last point about clients
12 making a conscious choice to choose you versus leaving MMA,
13 leaving one of the most respected firms in the country in terms
14 of its space, very well-respected retirement service division,
15 in [REDACTED] case, according to what Mr. Calder said, they
16 received a solicitation from you that was saying that this was
17 no big deal, this was some change in the back office protocol,
18 and just sign these forms and we'll be good.

19 And it was only because [REDACTED] was sitting with
20 Mr. Calder and they asked him about it. And he said to them,
21 No, no, I don't know what that is, but, you know, if you signed
22 that, then you're going to be leaving MMA and going to an
23 entirely different firm. It was only because of that that they
24 then determined that they wouldn't do that, they wouldn't sign
25 the paperwork, and everything else.

JA3VMARHredacted

Ferguson - cross

1 So you talk about clients making a conscious choice,
2 but weren't each of your solicitations that you sent on
3 February 12, 13, and 14, at a minimum, misleading, maybe even
4 flat-out deceptive, and that, at least in [REDACTED] case and a
5 couple of other examples that Mr. Calder shared, that clients
6 weren't making a conscious choice?

7 A. What you're choosing not to tell the Court is that I met
8 with [REDACTED] a month or two prior. I had a verbal conversation
9 with them in person explaining what I was doing.

10 I met with nearly all these clients in person first.
11 It's not -- think of this change. It's not realistic that I
12 would just send, Hey, sign this, good to go. I went out and
13 met with them. This is a very personal situation. If you have
14 an investment adviser, it's a personal relationship.

15 So I met with [REDACTED] in person, explained to them
16 what I'm doing.

17 I think Mr. Calder has misrepresented that when he met
18 with [REDACTED], they said, We understand Rick is, you know,
19 changing, and he talked them out of it. Because I met with
20 them. If MMA searches their records, they will see I had a
21 meeting with [REDACTED] prior, a committee meeting. And I
22 explained the situation to them.

23 Q. So you met with [REDACTED] a month in advance and told them
24 that you were leaving MMA, and that you were going to go to
25 Teros, and you were presenting that option to them?

JA3VMARHredacted

Ferguson - cross

1 A. As instructed by Jeff Calder.

2 MR. WICKHAM: Your Honor, all of this is new
3 information about him meeting with clients and soliciting them
4 a month in advance, but anyway.

5 A. Counsellor, how is that new information, when I've
6 testified, there's a lot of emails prior to this. There's at
7 least --

8 THE COURT: One second.

9 During the deposition, was the [REDACTED] email -- do you
10 recall whether the [REDACTED] email was marked as an exhibit?

11 MR. WICKHAM: Yes, we touched on all of those. As a
12 matter of fact, I actually had asked Mr. Ferguson, you know, at
13 the deposition about the meetings. Because the question was --
14 and I really don't want to testify on the deposition.

15 THE COURT: No, that's fine.

16 MR. WICKHAM: But the question was did you -- when you
17 were -- when you had this information about the change of the
18 fiduciary role from Mr. Ferguson to Mr. Stephens and all that,
19 what did you do? How did you communicate that to clients?

20 That's an entirely different conversation. You would
21 go to clients and say, Look, I have been your fiduciary. I'm
22 also your service adviser. But we have a new person coming
23 into the bay area, Mr. Stephens. I'd like to introduce you to
24 Mr. Stephens. And the company would be proposing that
25 Mr. Stephens come in as the client executive producer. I'll

JA3VMARHredacted

Ferguson - cross

1 still stay on and service and everything else. That's one
2 conversation. That's how you pass off clients. That's how you
3 do things.

4 I had no idea -- and Mr. Ferguson did not testify at
5 the deposition -- that he was telling clients, I'm going to
6 Teros, so come with me.

7 THE COURT: What I'll allow you to do, obviously, if
8 you believe they're saying it's inconsistent with the
9 deposition, I'm allow you -- we can talk a little bit about
10 post hearing. But there's still the issue of the third-party
11 documents and some other things still to come. But I will
12 allow, if you want post-hearing briefing, both with regard to
13 the testimony that was given -- and you can point out the
14 discrepancy between what the deposition testimony is and the
15 testimony here today.

16 Just to be clear, so this meeting you had a month
17 before, was it [REDACTED]? With [REDACTED]. You explained to them
18 that there's a new person coming in, and they had a choice
19 between going -- staying with MMS or going with you, wherever
20 you were going.

21 THE WITNESS: Correct.

22 THE COURT: And at that time, did you know where you
23 were going?

24 THE WITNESS: I had a very good idea. I had explored
25 various firms. Resources had -- was most interesting.

JA3VMARHredacted

Ferguson - cross

1 THE COURT: All right.

2 And who did you have this meeting with?

3 THE WITNESS: The [REDACTED] committee.

4 THE COURT: I'm sorry, it's a benefits committee or
5 something?

6 THE WITNESS: No, it's an investment committee.

7 THE COURT: All right, so the investment -- so it's
8 more -- is it just one person or is it --

9 THE WITNESS: They have three.

10 THE COURT: Okay. So you met with three people and
11 had this discussion and said -- and told them that you would be
12 leaving. And so at some point they were going to -- you were
13 going to ask them to make a choice basically.

14 THE WITNESS: Correct.

15 And your Honor, it should be pointed out that there
16 was a little mischaracterization there.

17 THE COURT: No, I understand that your position is
18 that what you were told was you were to go to clients and tell
19 them, You can stay with MMAS or you can come with me, at least
20 that's my understanding.

21 THE WITNESS: I mean mischaracterization as far as the
22 point of the meetings.

23 So these were normal meetings that I have to do with
24 clients to review their investments. So as part of that
25 meeting, I did my job, my normal job to meet with these clients

JA3VMARHredacted

Ferguson - cross

1 and review their investments.

2 THE COURT: So it was a regularly scheduled meeting.

3 THE WITNESS: Correct.

4 THE COURT: But you took the opportunity at that
5 meeting also to discuss the -- that you would be leaving and
6 that they would be faced with a choice.

7 THE WITNESS: Correct. Because during this time, my
8 impression was I was kind of being forced out, so -- and that
9 client chose not to go with me. They actually did reach out to
10 me afterwards and asked for my help on things. So I
11 communicated with them. But I knew they actively -- they had
12 looked at both sides and they said, Rick, we're staying.

13 THE COURT: Okay. Were there other -- besides
14 [REDACTED], had you had other meetings where you -- in-person
15 meetings where you had mentioned -- where you did the same
16 thing, where you mentioned, I'm going to be leaving, and the
17 decision is are you going to stay with MMAS or are you going to
18 come with me.

19 THE WITNESS: Yes, your Honor. There are exhibits in
20 mind. The problem is we started to look at them. They show I
21 was talking to clients, I was meeting with them. And some of
22 the clients said, Well, we're going to stay. Some said, Yes,
23 we would be interested, will you send us more information.

24 THE COURT: So that's part of the emails that I've
25 seen that are part of the --

JA3VMARHredacted

Ferguson - cross

1 THE WITNESS: Correct. A lot of emails.

2 And, your Honor, I did send emails with Teros
3 information because I thought it was okay. I thought I was
4 following the instructions of Jeff Calder.

5 THE COURT: Okay. You may continue.

6 BY MR. WICKHAM:

7 Q. And just to be clear, these meetings, when you're meeting
8 with MMA clients and telling them that you're leaving MMA,
9 you're going to Teros, and you're asking them whether they'll
10 go to Teros with you, you were still an MMA employee at that
11 time, right?

12 A. Well, I -- this is where we've always disagreed,
13 counsellor. I consider all my actions done with investment
14 clients to be under MMAS. So I would ask you to refer to MMAS
15 when we're talking about securities claims, as FINRA regulation
16 requires.

17 THE COURT: Well, putting that aside, you were still
18 employed by a Marsh & McLennan entity.

19 THE WITNESS: Yes.

20 THE COURT: All right.

21 BY MR. WICKHAM:

22 Q. To the extent that any of these trips to meet with the
23 Marsh & McLennan clients, were you putting in expense reports
24 on these things?

25 A. Yes, because as I've testified, I was doing a normal

JA3VMARHredacted

Ferguson - cross

1 meeting. I am required to meet with all my clients on a
2 regular basis to review their investments.

3 Q. And did you bring Jeff Stephens to any of these meetings?

4 A. No.

5 Q. Okay.

6 A. Why would I?

7 Q. Now, during this time period, were you using your personal
8 email -- were you using your personal emails to communicate
9 with Teros?

10 A. Yes.

11 Q. Okay. And were you using your personal email to talk about
12 your plans?

13 THE COURT: Mr. Wickham, just so you're saying -- I
14 just want to get the time frame. I think you said "at this
15 time."

16 MR. WICKHAM: My apologies.

17 THE COURT: That's okay.

18 Q. In late December of 2018 and January of 2019, while you're
19 still employed by a Marsh entity, were you using your personal
20 email account to communicate with Nate White, the president of
21 Teros, about your plans to leave the Marsh entity to go to
22 Teros?

23 A. Some, yes, just like we've seen I did with Barney & Barney
24 when I joined them.

25 Q. Okay. So MMA -- excuse me, the Marsh entities' security

JA3VMARHredacted

Ferguson - cross

1 protocols for emails going out of the firm that are
2 inappropriate, they don't apply to your personal email account,
3 so they wouldn't know that you were having all these
4 communications with Mr. White, right?

5 A. Well, actually, they were, because I also sent some emails
6 directly from my MMA account to Teros.

7 Q. I'm sorry. The emails that you were sending from your
8 personal email address, that wouldn't have been flagged by the
9 Marsh entity protocol, right?

10 A. Correct, because that was about my personal business, not
11 MMA or MMAS.

12 Q. Okay. Well, these were communications that you were having
13 with Mr. White about your plans to take your book of business
14 from the Marsh entity to Teros, right?

15 A. As instructed by Jeff Calder, yes.

16 Counsellor, we've been over this.

17 Q. Okay. And you sent to Mr. White the client list that is
18 referenced -- that Mr. Calder previously looked at. It's
19 Plaintiff's Exhibit 26.

20 A. Correct. Regulation S-P says that a securities adviser can
21 take a client list and contact information, the basic contact
22 information.

23 Q. Hold on. I just want to make sure you have Exhibit 26 in
24 front of you.

25 THE COURT: Just one second.

JA3VMARHredacted

Ferguson - cross

1 A. Okay.

2 Q. Did you prepare this document or did you take this off of
3 the Marsh computer system?

4 A. I prepared this. Marsh wouldn't have anything like this.

5 Q. Okay. Well, this has -- all these various clients on the
6 right-hand side, these are Marsh clients, right?

7 A. Correct. All this information is exempt per security
8 Regulation S-P, which exempts all the information as we looked
9 at in the document --

10 THE COURT: The question -- again, this is not about
11 arguments, it's about what does the document indicate.

12 THE WITNESS: Yes.

13 Q. These were all Marsh clients, right?

14 A. No. Some of these were not MMA clients. These were --
15 make the distinction. When you say "Marsh," that's like 15
16 companies.

17 Q. Marsh entity clients, using your terminology.

18 THE COURT: Look, here's the issue, all right. When
19 we say -- I understand you want MMA Securities. I get it. But
20 if we're going to quibble about -- you were either -- under
21 either parties' interpretation, you're either MMA Securities or
22 MMA Agency LLC, all right.

23 So let's just assume that when we say "Marsh," we're
24 referring to both. And I understand the relative arguments
25 around that.

JA3VMARHredacted

Ferguson - cross

1 Next question.

2 BY MR. WICKHAM:

3 Q. Were all these Marsh clients?

4 A. Hold on, counsel.

5 THE WITNESS: Your Honor, I would like to respectfully
6 submit if we say "Marsh," that's probably 30,000 clients.
7 Marsh owns so many companies.

8 THE COURT: This is a list that's in front of you.
9 It's Exhibit 26. Look at the names on this list. Are they
10 clients of Marsh Securities or Marsh & McLennan Agency LLC?

11 THE WITNESS: Yes.

12 THE COURT: Okay.

13 Q. And the revenue numbers, are those revenue numbers that you
14 took from the computer systems, estimated revenue numbers?

15 A. Well, they are estimated, so, no, I didn't take them from
16 the computer system.

17 THE COURT: Well --

18 A. The computer system would have exact.

19 THE COURT: Well, wait a second. You're saying that
20 you calculated the first one, [REDACTED], the estimated
21 revenue to be [REDACTED]?

22 THE WITNESS: No. Your Honor, he asked me if all of
23 them -- you look down here below, some of them, \$5,000.

24 THE COURT: But who -- where did this -- did you
25 calculate these?

JA3VMARHredacted

Ferguson - cross

1 THE WITNESS: This is -- yeah, the way we calculate
2 it, the way I calculate it, the assets time a certain amount of
3 whatever commissions.

4 THE COURT: In other words, you didn't take this --
5 you, yourself sat and basically made these estimated revenue
6 numbers?

7 THE WITNESS: Correct. The MMA system does not have
8 this information. It only says -- in fact, the MMA system
9 doesn't include -- all it has is the assets.

10 THE COURT: Well, how did you create this estimated --
11 why don't you take us through how you created the estimated
12 revenue.

13 THE WITNESS: So it came from a spreadsheet. You see
14 [REDACTED], [REDACTED]. So what I would have taken, okay,
15 what do I know are the assets, times what do I know -- I know
16 that they -- the commission on that is 25 basis points.

17 THE COURT: How do you know that?

18 THE WITNESS: I'm with my client. All of these are my
19 clients; I know what their commissions are.

20 THE COURT: So you took that information and then you
21 did the calculation, provide what the revenue is.

22 THE WITNESS: Yeah. It's an Excel spreadsheet, so it
23 has it in there.

24 THE COURT: Okay. Go ahead.

25 THE WITNESS: And, your Honor, I would point out, as

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Ferguson - cross

1 we saw earlier, I believe it was Kim Blackmore, stated I did
2 not have access to this information. In her email she said,
3 Can't give you access. So I had to do this myself.

4 THE COURT: Okay.

5 BY MR. WICKHAM:

6 Q. So your testimony is is that you didn't simply just, you
7 know, copy this from Marsh documents; you sat down with a
8 calculator and you came up with these numbers on your own, is
9 that your testimony?

10 A. I would alter that just a little bit that, yes, I did, but
11 it's an Excel spreadsheet, if you consider that a calculator.

12 Q. Okay. And the list of the clients themselves --

13 THE COURT: I'm sorry, just one second.

14 When you say -- so you had an Excel spreadsheet that
15 you -- in other words, when you say an Excel spreadsheet, are
16 you saying the Excel spreadsheet did the calculation?

17 THE WITNESS: Correct, your Honor.

18 THE COURT: So you created the Excel spreadsheet so
19 that it would do the calculation.

20 THE WITNESS: Correct, your Honor.

21 THE COURT: And how long had you had this Excel
22 spreadsheet?

23 THE WITNESS: I have had many versions of these -- as
24 I stated earlier, the MMA systems, they don't have this, so I
25 had to create it myself.

JA3VMARHredacted

Ferguson - cross

1 THE COURT: Okay. All right.

2 I'm sorry, counsel. Go ahead.

3 BY MR. WICKHAM:

4 Q. And when did you do these calculations? When did you
5 create this document?

6 A. I would have done something like this several times a year.

7 Q. Beginning when?

8 A. As long as I get clients. If the systems available to me
9 don't have this type of information -- obviously this is
10 something I want to keep track of.

11 THE COURT: Why?

12 THE WITNESS: For my income that through the years MMA
13 kept promising me that they would pay me based on my original
14 contract. So I kept track of this.

15 THE COURT: Whoa.

16 Let me ask, what was your compensation based on when
17 you were at -- right before you left? In other words, let's
18 not get into whatever was that November 2018, but was your --
19 did you actually have commissions? Other than the first time,
20 25 percent commission, did you have commissions that would
21 be -- you're entitled to year over year, based upon business
22 that you brought in?

23 THE WITNESS: There was two; so, yes. There was one
24 was new business, 25 percent; but there was also, as Jeff
25 Calder stated, a competency, which is based off part of my book

JA3VMARHredacted

Ferguson - cross

1 of business. So they total it up.

2 Unfortunately, they didn't keep track of this. So
3 each year I had to present this during my annual review and
4 say, Here's my clients. Here's my calculations of what new
5 business I did. And here's my total book of business, because
6 there's a bonus on each of those.

7 THE COURT: That's based upon -- so you're servicing
8 those clients.

9 THE WITNESS: Correct, as the investment adviser.

10 THE COURT: So you would basically say in your -- as I
11 understand it, in order to -- when you go in to make a pitch
12 about what your compensation should be and what your bonus
13 should be or whatever, you would indicate, I had 35 clients. I
14 know that the revenue approximately that was generated from
15 that is X, so my book of business is that much. I think, you
16 know, I should be entitled to, you know, whatever.

17 THE WITNESS: That's an approximation, yes. A big
18 distinction, I think, is to remember, MMA never assigned me any
19 help. I was on my own. I was both the sales and the service.

20 THE COURT: Okay. All right.

21 I'm sorry, go ahead, Mr. Wickham.

22 If I could ask just for you to step back, and if we
23 could have counsel in the initial conference.

24 (Recess)

25 BY MR. WICKHAM:

JA3VMARHredacted

Ferguson - cross

1 Q. I just want to -- not to belabor this matter, but going
2 back to the spreadsheet that you created --

3 A. Can you remind me, which tab?

4 THE COURT: 26.

5 Q. 26.

6 So if I understand what you're saying, that you
7 maintained a list of Marsh clients at home or on your personal
8 computer or something like that over many years?

9 A. Yes.

10 Q. Okay. And in an Excel spreadsheet, you used that Excel
11 spreadsheet in order to run estimates of what revenues would
12 have been year over year?

13 A. Correct. I was required to by MMA.

14 Q. Okay. So this is all during your employment with Marsh,
15 and this is information that is relevant to your job at Marsh,
16 right?

17 A. Correct. As I've stated in past testimony, this was kept
18 both on my MMA Securities laptop, but I would also do a lot of
19 work at home. Remember I had to do two jobs, unlike other
20 people. So it required me to work 60, 70 hours a week. So I
21 did a lot of work at home.

22 Q. Okay. And this is a document that you've just recently
23 produced to us in response to the document request; is that
24 right?

25 A. I believe so.

JA3VMARHredacted

Ferguson - cross

1 Q. Okay. Weren't you, under the Marsh agreement, required to
2 return all Marsh property and documents?

3 A. Yes.

4 Q. Wasn't the cease and desist letter that I sent to you on
5 February 19, didn't that demand the return of all documents
6 pertaining to Marsh and your employment and everything else?

7 A. And as I've explained in prior testimony, I took that as
8 MMA, but, of course, under Regulation S-P, MMAS, this is not
9 confidential information, this is public information.

10 Q. This is something you created while you're employed by
11 Marsh relating to your job at Marsh. But you don't think that
12 this is information that belongs to Marsh?

13 A. I believe it's information that belongs to the client.

14 Q. Well, this is more than that. This is a compilation of
15 clients and revenue estimates. This doesn't belong to any
16 individual client; this is something that you said belongs
17 to -- related to your employment.

18 A. Counsellor, Regulation S-P says that the client list
19 belongs to the adviser.

20 THE COURT: Let me ask just a quick question.

21 So this was on your -- you had a copy of this, the
22 Excel spreadsheet, on your Marsh computer?

23 THE WITNESS: Yes, and on my home --

24 THE COURT: And on your home computer.

25 BY MR. WICKHAM:

JA3VMARHredacted

Ferguson - cross

1 Q. You said Regulation S-P, is that right? Is that what you
2 just said?

3 A. Correct.

4 Q. S-P, Sam Paul?

5 A. Yes.

6 Q. Okay. The SEC regulation Sam Paul?

7 A. Correct.

8 Q. Okay.

9 MR. WICKHAM: We'll come back to that, your Honor.

10 THE COURT: Sure.

11 Q. We respectfully disagree with any statements about that. I
12 was looking at that issue just this morning, Mr. Ferguson.

13 But regardless, the MMA agreement that we were talking
14 about earlier that is in Exhibit 3 to the plaintiff's
15 exhibits --

16 THE COURT: Exhibit 3, in the smaller binder.

17 THE WITNESS: Okay.

18 Q. So just so I understand this, the first page of this
19 document, where it says "Barney & Barney MMA Nonsolicitation
20 and Confidentiality Agreement," has this page been altered in
21 any way from what you originally saw?

22 A. I wouldn't know that. That was five years ago.

23 Q. Do you have any information that it has been?

24 A. No.

25 Q. Okay. So let's just look at the top of this. It says:

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Ferguson - cross

1 Agreement dated as of 2/1. Is that your printing there, the
2 2/1?

3 A. I believe it is.

4 Q. Okay. 2014, between Barney & Barney, a Marsh & McLennan
5 Agency company, and subsidiaries thereof, together with its
6 parents and affiliates and Elmer Ferguson.

7 Does this look like the agreement that the company --
8 the offer letter that you received after Marsh acquired Barney
9 & Barney?

10 A. It does.

11 Q. Okay.

12 And in here it says, on the second whereas clause,
13 under where it says recitals, do you see where I'm referring?
14 It says recitals there, and then it says whereas is one, and
15 then there's a second whereas. Do you see where I'm referring?

16 A. I see, yes.

17 Q. Whereas simultaneously with and immediately subsequent to
18 the Barney & Barney acquisition, Barney & Barney was merged
19 with and into employer, and the employee shall be the surviving
20 entity of such merger.

21 Was that your understanding of the transaction, that
22 Barney & Barney was being merged into Marsh?

23 A. That was the intention, yes. My understanding was that
24 they bought the company first.

25 Q. Right. Okay.

JA3VMARHredacted

Ferguson - cross

1 But you have no information that it wasn't merged in,
2 right?

3 A. Correct.

4 Q. Okay.

5 The next whereas clause, it says: Employee was
6 employed by Barney & Barney immediately prior to the Barney &
7 Barney acquisition and, subsequent to the merger, has been
8 offered and has accepted employment with the employer.

9 Do you see that there?

10 A. Yes.

11 Q. Okay.

12 And if you go up to the definition of the employer at
13 the very top in the second line of the document, it says:
14 Between Barney & Barney and Marsh & McLennan Agency LLC Company
15 and/or subsidiaries thereof, and it has a defined term,
16 "employer."

17 So was it your understanding at this time that your
18 employment with Barney & Barney, in effect, was ending by
19 virtue of the merger, and that you were going to work for a
20 entity that was, you know, part of the Marsh & McLennan Agency
21 Company?

22 A. I would not completely agree with your summary there. As I
23 had repeatedly shown, I considered myself working under MMAS,
24 because everything I do and everything I did for any of these
25 companies is securities related; they are all securities

JA3VMARHredacted

Ferguson - cross

1 clients. So, yes, I do see that this contract was going from
2 Barney & Barney, that MMA bought them, that they were all
3 shifting to that structure.

4 Q. Okay. And that you were accepting employment with this
5 Marsh entity, yes?

6 A. While we disagreed on the definition of employment, yes.

7 Q. Okay.

8 I'm not going to ask you about the regulation, but let
9 me ask you something I know a little bit about, which is
10 employment law. Have you ever heard of the concept of joint
11 employment?

12 A. No. But I think I know -- I understand the term.

13 Q. Where somebody could have two employers.

14 A. Yes.

15 Q. You've heard of that before?

16 A. I understand the concept.

17 Q. Okay.

18 Do you think it's conceivable here that you could have
19 been an MMA employee and, at certain times, for certain
20 purposes, referred to as a MMAS employee?

21 A. Counsel, that's been my point all along. For everything on
22 these complaints, they apply to my employment with MMAS.

23 Q. No, I'm asking whether it's conceivable. Whether you
24 completely rule it out or whether it's conceivable that you
25 could have been an employee of both?

JA3VMARHredacted

Ferguson - cross

1 A. Of course. That's been my point all along.

2 Q. Okay. And your registration was with -- well, originally
3 SagePoint, and then MMC, and then later, MMAS, right?

4 A. I followed you there. From SagePoint to MM -- and jointly
5 with MMCS, and then MMAS. I think that's correct.

6 Q. Right. So your securities registration was with MMAS,
7 which is where it should be, right?

8 A. Correct.

9 Q. Okay.

10 And on the first page of Exhibit 3, the
11 nonsolicitation and confidentiality agreement -- and by the
12 way, you ultimately did say that you signed this document after
13 you struck some things out, right?

14 A. Yeah. Perhaps we didn't agree that I signed a version of
15 it.

16 Q. Okay.

17 And if I understand your prior testimony, you did not
18 strike out paragraph 1; is that right?

19 A. I don't remember doing that.

20 Q. Okay.

21 And you did not strike out paragraph 2, which is on
22 page 3?

23 A. I do not remember doing that.

24 Q. Okay.

25 You do believe, however, on the bottom of page 4 and

JA3VMARHredacted

Ferguson - cross

1 the carryover on page 5, the liquidated damages clause, you do
2 believe that you struck that out?

3 A. Well, I didn't think there was a minute point there. I
4 don't know exactly what -- if we take your statement and
5 promise that this is the original version, then, yes. And as
6 I've testified previously and I showed in another example, the
7 liquidated damages, this, in my opinion, goes against certain
8 rules and regulations. So, yes, I would have.

9 Q. Right. But this is the paragraph, paragraph 7, that's the
10 one you think you struck out, right?

11 A. Yes, with -- attorney, you're trying to put a few words in
12 my mouth here that I don't know what that original document
13 was. We don't have clarification because you submitted -- the
14 document is not the same.

15 THE COURT: Well, but the issue though is -- and I
16 think I had asked this. You have a recollection you struck
17 something, is that an accurate statement?

18 THE WITNESS: Correct.

19 THE COURT: What is your recollection as to what you
20 struck?

21 THE WITNESS: It would have been this. So --

22 THE COURT: Understanding that -- in other words, you
23 recall having struck something having to do with damages,
24 liquidated damages. You don't know whether or not the specific
25 language on page 5 of 9 was, in fact, the language you struck.

JA3VMARHredacted

Ferguson - cross

1 THE WITNESS: Correct.

2 THE COURT: All right.

3 BY MR. WICKHAM:

4 Q. But you recall striking the liquidated damages clause,
5 whatever that was, right?

6 A. Correct.

7 Q. That's the only clause you struck, right?

8 A. Well, now you're asking me -- because I did point out there
9 was other pages. And given as long ago as this document was, I
10 can't make a testimony or statement that I didn't strike
11 anything else out.

12 THE COURT: Well, do you recall though? Understanding
13 that, do you recall striking anything else out?

14 THE WITNESS: I don't recall whether I did or not.

15 THE COURT: Okay.

16 Q. And you went to your Exhibit 52. Why don't you get to that
17 please.

18 A. Okay.

19 Q. And you use that as an illustration of your striking out
20 the liquidated damages clause because of some objection to it;
21 is that right?

22 A. Yes.

23 Q. Okay.

24 And that was a 2013 producer agreement at Barney &
25 Barney, not at MMA, right?

JA3VMARHredacted

Ferguson - cross

1 A. Correct.

2 Q. Okay.

3 Can you flip over to Exhibit 20 of the plaintiff's
4 exhibits?

5 A. Okay.

6 Q. So the agreement that originally was dated on your exhibit
7 in August, I believe, 13th day of August, 2013, and that
8 document you didn't sign; correct?

9 A. Correct.

10 Q. If you go to the last page there of your Exhibit 52, you
11 didn't sign it?

12 A. Correct.

13 Q. Right?

14 Because you had those things that you wanted to strike
15 out.

16 A. Correct.

17 Q. Okay. But then when that document was again presented to
18 you in Exhibit 20 of the plaintiff's exhibits, as of November
19 1, 2013 --

20 A. '14.

21 Q. I'm sorry, Exhibit 20.

22 THE COURT: Exhibit 20. November, yes, the first,
23 yes, I'm sorry.

24 Q. Then later, actually on January 14, 2014, you did sign it,
25 right?

JA3VMARHredacted

Ferguson - cross

1 A. Correct.

2 Q. Okay. With liquidated damages language unstruck.

3 A. Correct. I was told that I'd be fired if I didn't.

4 I needed a job, Mr. Wickham. I'm not a rich man. I
5 don't have a lot of money. I needed this job.

6 Q. You had just shared your striking language as indicating
7 that somehow you wouldn't have signed it at all, and that was
8 an illustration of proof that you didn't sign it. And it looks
9 like, you know, you did propose striking it, but then
10 ultimately you did sign it unstruck, right?

11 A. I believe you're mischaracterizing that. That I didn't say
12 I wouldn't sign it, I said I testified -- I stated to the
13 employer, I shouldn't be signing this, I don't want to sign
14 this. I gave an example. But that's a different situation
15 than your employer coming to you and saying, You're going to be
16 fired if you don't sign this.

17 Q. Well, it's not -- well, I don't want to get into argument.

18 THE COURT: Who actually -- who told you that? Who
19 told you that you'd be fired?

20 THE WITNESS: Bill Peartree.

21 THE COURT: Fired or you just wouldn't have a job? In
22 other words, there's a difference between saying, Look, this is
23 the agreement, take it or leave it. If you don't want to, you
24 don't have to come work at MMA.

25 THE WITNESS: That's a very good point, your Honor.

JA3VMARHredacted

Ferguson - cross

1 And I would say that that's the way it was. It was presented
2 to me like take this or leave.

3 THE COURT: That's sort of what -- that was -- okay.

4 All right. No, I understand it.

5 Q. And just --

6 THE COURT: So let me ask, is that your recollection
7 of what then happened when you were presented with the
8 agreement in February? In other words, that's Exhibit 3 to the
9 plaintiffs? In other words, that you struck out initially that
10 provision, but eventually you signed it?

11 THE WITNESS: Correct. I needed a job.

12 THE COURT: So the fact that you -- so the agreement
13 that you signed actually had the liquidated damages provision.

14 THE WITNESS: I don't know, because that -- on this
15 version, as I remember, it was struck out.

16 THE COURT: No, no. But I guess what I'm asking is --
17 so Exhibit 3, you were presented with it initially. You struck
18 out that liquidated damages portion.

19 THE WITNESS: Correct.

20 THE COURT: Did you subsequently -- putting aside what
21 the literal language was, in other words, did you subsequently
22 sign a version of the agreement with a liquidated damages
23 provision because you were basically told, Look, that's fine,
24 Rick, if you want to, you can -- but this is take it or leave
25 it basically.

JA3VMARHredacted

Ferguson - cross

1 THE WITNESS: Now I understand.

2 To my knowledge, no, I did not; that the version I
3 signed did have this struck out still.

4 THE COURT: Okay. I just wanted to clarify that.

5 All right. Go ahead, Mr. Wickham.

6 BY MR. WICKHAM:

7 Q. But you don't have a copy of Exhibit 3 that has the
8 strikeout, do you?

9 A. Oh, I wish I did, but, no.

10 Q. Okay.

11 Well, you do have 2007 email messages, email messages
12 when you were first applying for a job at Barney & Barney; you
13 retained those, right?

14 A. Correct.

15 Q. Okay. But you didn't retain the strikeout of the
16 liquidated damages clause of the confidentiality agreement for
17 MMA?

18 A. I thought that I did, but I could not find it.

19 Q. Okay.

20 And just not to leave Exhibit 20 too quickly, do you
21 have that in front of you please?

22 A. Okay.

23 Q. And just turn to paragraph 2.3.

24 A. Wait, I'm on the wrong one. What exhibit?

25 THE COURT: Exhibit 20.

JA3VMARHredacted

Ferguson - cross

1 A. Okay.

2 Q. Do you have that in front of you?

3 A. I do.

4 Q. And do you see where it says "Confidential Information and
5 Materials"?

6 A. I do.

7 Q. Do you see that there?

8 And do you see, if you go down one, two, three, four,
9 five, six, seven, eight, nine, ten lines in that paragraph,
10 where it says: All confidential and proprietary information of
11 B&B, whether prepared by B&B, employee or otherwise, that comes
12 into employee's possession, shall remain the exclusive property
13 of B&B and shall not be removed from the premises of B&B under
14 any circumstances without the prior written consent of B&B,
15 except as necessary to conduct the business of B&B.

16 You saw that there?

17 A. Yes.

18 Q. Okay. You didn't strike out this clause, right?

19 A. Apparently not.

20 Q. And you signed this agreement?

21 A. I think I did.

22 Q. Okay.

23 And the information that you were putting into that
24 spreadsheet that you were using year after year, that also is
25 information that came to you in the course and scope of your

JA3VMARHredacted

Ferguson - cross

1 employment with the Marsh entity, but you didn't give that
2 back, right?

3 A. Well, that's -- there's a difference there, counsellor.
4 Everything that I prepared, you guys do have back. And Diane
5 Rosen told me to destroy everything, which I did back in -- I
6 don't know when her -- I don't remember her email, whether it
7 was December or January. She said, Confirm you've destroyed
8 everything, which at that time I did.

9 And anything after that, from your own exhibit, cannot
10 leave the premises of Barney & Barney under any circumstances
11 without the prior written consent of B&B, except as necessary
12 to conduct the business of B&B.

13 I was conducting the business of B&B, subsequently
14 MMA. As we have seen, they were fully aware of it. They knew
15 what I was doing. And for the purposes of our intent here
16 today, they instructed me to do it. So I was following.

17 THE COURT: Well, but I guess the issue that was --
18 you still have this spreadsheet, right?

19 THE WITNESS: Well, the first that I have I created
20 afterwards.

21 THE COURT: Well, let me just ask you, so you created
22 a version that you kept at work, and you had another one on
23 your personal computer. Are you saying you destroyed the one
24 that you had -- you either gave back or destroyed the one you
25 had on your work computer, and then you deleted or destroyed

JA3VMARHredacted

Ferguson - cross

1 the one on your personal computer, and then you recreated it.

2 THE WITNESS: Let me follow it through.

3 Correct. I don't remember when Diane Rosen said, but
4 she said, Rick, you know, I want you to go. And she looked at
5 it and said okay. We had a conversation. And I said, you
6 know, I do work at home.

7 She goes, I know it. Everybody does. But will you
8 please go destroy all of that information, which I had no
9 problem with it, because it's old information, I don't need it
10 anymore. So at that time I destroyed everything.

11 Now, going forward, you see it's a list of clients, so
12 I just recreated it.

13 THE COURT: When you say you recreated it, where did
14 you get the numbers from? Are there other underlying raw data
15 that you would need? I understand you may remember the
16 percentages, what the percentages may be, but where did you get
17 the raw numbers to create the end result in the spreadsheet?

18 THE WITNESS: I pull it from different sources, but
19 the main one, as you've seen -- so I'm required, as -- well,
20 I'm not required to. As part of my personal business practice,
21 I keep all my clients' 5500s. So -- and as we saw, all of that
22 information is on there. Because I don't want to keep reaching
23 out to a client every time I want to know the financial
24 information. Financial companies like Oppenheimer, JPMorgan,
25 all of them, they have it. So I can reach out to them and get

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Ferguson - cross

1 that information as well. But mainly, as we saw, 5500s and
2 other sources. And then, yes, some of it I know because I'm
3 also doing meetings regularly with these people. So as I might
4 do a meeting, I am going over their investments and I would
5 know, Okay, you have \$10 million -- you have 20 million
6 overall, 20,500,000, whatever. Well, I know what that is.
7 Okay, that client had \$20,000,500, put that in there, I know I
8 made 25 basis points on that.

9 THE COURT: Okay.

10 BY MR. WICKHAM:

11 Q. Now, let me show you a version -- a declaration that we
12 have presented.

13 MR. WICKHAM: Your Honor, may I approach the witness?

14 THE COURT: You may.

15 Q. This is from Diane Rosen. You talked about that with
16 Mr. Calder a couple of times.

17 If you turn to the third exhibit of this -- do you
18 know where this same grouping of exhibits are in your exhibit
19 binder? Because my colleagues can't seem to find it.

20 A. I'm sorry, I don't.

21 Q. Okay. All right. We'll just go with the one I got here.
22 If we find the other ones, then we'll let you know.

23 But if you turn to Exhibit 17 of this, do you see that
24 in front of you?

25 A. I do.

JA3VMARHredacted

Ferguson - cross

1 Q. Okay. So this is an email string between you and Diane
2 Rosen, right?

3 A. Correct.

4 Q. And if you go to her email at the bottom, the January 24
5 email at 1:26 p.m., she's sending an email to you. Do you see
6 that there?

7 A. I do.

8 Q. And it says: Rick -- skipping over the first paragraph --
9 as part of our call, we discussed the company's policy on
10 acceptable use of information assets and the strict prohibition
11 of the transmission of confidential client information to a
12 colleague's personal email address. Do you see that there?

13 A. Yes.

14 Q. Did you have that discussion with Ms. Rosen?

15 A. Yes.

16 Q. Did she tell you that there's a strict prohibition on the
17 transmission of confidential client information to your
18 personal email address?

19 A. That's not how she phrased it.

20 Q. Okay. All right.

21 A. Counsel, let me finish my answer.

22 Q. We've got her declaration here. I'll follow up with --

23 A. Counsel, I'm allowed to answer.

24 THE COURT: So, I'm sorry, so that's not what you
25 understand what she said. What she said is in this email, is

JA3VMARHredacted

Ferguson - cross

1 that --

2 THE WITNESS: Well, no. She -- he's characterizing it
3 as, yes, we talked about this. She told me, I get it, Rick.
4 It's no big deal. I have to tell you this. So she told me,
5 she was like, I have to put this in an email and tell this to
6 you.

7 THE COURT: Okay.

8 BY MR. WICKHAM:

9 Q. And then she goes on to say: We also discussed the fact
10 that certain emails have been flagged in the email system due
11 to your forwarding those emails to your personal email address.

12 Do you see that there?

13 A. Yes.

14 Q. Did you discuss that with her as well?

15 A. Correct. It's one of my whole points, counsellor, is that
16 MMA says they weren't aware of anything I was doing, but here
17 we can see they obviously were.

18 Q. They found that you had sent things to your personal email
19 address.

20 And then she said: While these client transmissions
21 are of published articles that may be of interest to MMA's
22 investment clients, the emails also contain email addresses of
23 our clients, which is considered confidential proprietary
24 company information. Do you see that there?

25 A. I do.

JA3VMARHredacted

Ferguson - cross

1 Q. Was that a message that she sent to you and that you
2 reviewed on the date that you received this, on or about
3 January 24, 2019?

4 A. Yes. She sent this after we had our phone conversation.

5 Q. So you knew at that point in time that the company
6 considered the email addresses of its clients to be
7 confidential proprietary information, right?

8 A. Well, counsellor, during our phone conversation, I had --
9 same thing I've always done: I told her, I said, Well, let's
10 make the distinction. MMAS clients versus MMA. And I stated,
11 this information, including email address, is publicly
12 available. As I showed here today, it took me a Google search
13 to find somebody's email address.

14 So we did talk about that and that distinction in our
15 phone call. And she said, Rick, I get it. I understand. And
16 she goes, I know you were just copying yourself because you
17 wanted these articles to read. Because, she goes, I know you
18 do a lot of work at home, we all know it. But I have to send
19 you this email. It's part of compliance.

20 Q. She sent you an email message telling you that the company
21 considered those emails company proprietary information; isn't
22 that right?

23 A. Yes, per the conversation as I just stated.

24 Q. And then she said to you: I would ask that you review your
25 personal email records, delete all emails containing MMA client

JA3VMARHredacted

Ferguson - cross

1 email addresses, and confirm to me back that this has been
2 completed. She said that to you as well?

3 A. Correct. Distinction, MMA, which we discussed on our phone
4 call.

5 Q. But you didn't do that, did you?

6 A. I did go into a lot of information.

7 Q. Well, no. Two weeks later, on January 13 and 14, you then
8 sent all of this email attachments and emails to your computer,
9 your personal computer. Oh, no, you sent it to your Teros
10 computer.

11 When she said you can't send it to your personal
12 computer, did you think, Ah, well, I Diane said I can't send
13 company proprietary information to my personal computer, but I
14 can send it to Teros. Was that your thinking? Was that your
15 thought process, why it was appropriate for you to send out all
16 of that client information to Teros?

17 A. Counsel, I don't want to be destructful (sic), but you know
18 how ridiculous that sounds?

19 We've already discussed Jeff Calder instructed me to
20 do this. I'm not a moron. And I have never denied this. I
21 sent all that information from my MMA computer to my Teros.
22 Why would I do that unless I was following the instructions, as
23 allowed to in that agreement? I was instructed by Barney &
24 Barney, I was operating under those instructions. I knew this
25 would be flagged; I just had a conversation with Diane Rosen.

JA3VMARHredacted

Ferguson - cross

1 You're speaking to my point that there's -- I did this with
2 full knowledge that they --

3 THE COURT: That's the crux of the issue that I've got
4 to decide. It's not necessarily what necessarily was in your
5 mind, but what the ramifications of it are.

6 Let me ask this: The clients that are listed on the
7 spreadsheet in Exhibit 26, Plaintiff's 26, those clients
8 received retirement services, is that accurate?

9 THE WITNESS: Correct.

10 THE COURT: So they had 401 -- but they also -- did
11 many of them also receive other -- have other products, Marsh &
12 McLennan products, that were not retirement?

13 THE WITNESS: I would assume so, but --

14 THE COURT: So they were in addition -- and this is --
15 again, I'm not saying I'm taking this in the way I'm saying.
16 They were -- they had security -- they had agreements with MMS
17 for their retirement, right?

18 THE WITNESS: Correct.

19 THE COURT: And they had -- presumably they had
20 agreements related to these other products that they were
21 getting from Marsh.

22 THE WITNESS: If they had them, I would assume they
23 would.

24 THE COURT: So they were clients of both MMS and MMA,
25 right?

JA3VMARHredacted

Ferguson - cross

1 THE WITNESS: If they were, yes.

2 THE COURT: What do you mean if they were? We saw
3 other documents that showed -- I think there was a spreadsheet
4 that showed there was income coming from different places; some
5 of it was retirement, some of it were other products.

6 THE WITNESS: Correct.

7 As we also saw, I was not allowed to see that side of
8 the business. So I actually don't know which of these clients
9 had other business, unless for some reason, like, they might be
10 out there at the same time I'm doing it, or --

11 THE COURT: Wait, wait.

12 Are you saying that you would go and you would present
13 the retirement services, you wouldn't know what other things --
14 putting aside access on a computer system, you wouldn't know
15 that there were other people at Marsh who had contact with your
16 clients?

17 THE WITNESS: Sometimes, occasionally. But there's a
18 lot of them I don't know, because I operate so independent.
19 MMA has structured it this way. For my securities business,
20 I'm completely on my own. A lot of my reviews show that Rick
21 works independent. Jeff Calder had statements on that. So I
22 honestly do not know every client --

23 THE COURT: But you knew at the time that in light of
24 the fact that Marsh is the size that it is, that many of the
25 clients, in addition to having retirement services, they had

JA3VMARHredacted

Ferguson - cross

1 other services provided by Marsh, right?

2 THE WITNESS: I assume so. Like an example would
3 be --

4 THE COURT: Not just assume so. You knew for some of
5 these clients.

6 THE WITNESS: For some of them I knew, yes.

7 THE COURT: And so for those clients, weren't they
8 clearly -- they were also Marsh clients, right?

9 THE WITNESS: Yes.

10 THE COURT: All right. And so they -- and so you had
11 an agreement, right -- putting aside your agreement was with
12 MMA, whatever it is, so those clients were both MMA Securities
13 clients -- and this is, again, taking your understanding of
14 it -- and MMA clients, right?

15 THE WITNESS: Some of them were.

16 THE COURT: Okay. All right.

17 Go ahead, Mr. Wickham.

18 BY MR. WICKHAM:

19 Q. Mr. Ferguson, what I don't understand is when Ms. Rosen
20 just had told you on January 24 to, No. 1, don't send things to
21 your personal email address; and, No. 2, to delete things from
22 your personal email address, after she made that clear to you
23 as the MMA compliance officer, why did you think that two weeks
24 later that you would be able to send email messages to Teros
25 with all of that very same client information?

JA3VMARHredacted

Ferguson - cross

1 A. Counsellor you just made two different examples. You
2 state -- we were talking about my personal email address.
3 Great. Okay. Didn't do it. Now you're saying, Well, why did
4 you follow Jeff Calder's instructions to send them to Teros.

5 Q. So you thought that because she said don't send them to
6 your personal email address, you thought it was okay to send
7 that very same information to a competitor's email address,
8 right? That's what you're saying?

9 A. I was transitioning my book, yes. Under the direction of
10 MMA and MMAS, I was transferring my book of clients that chose
11 to go with me.

12 Q. Okay. Well, you resigned on what date?

13 A. February 15.

14 Q. Okay. And you sent all those emails to yourself, at least
15 according to the exhibits we saw earlier, on the 13th and 14th
16 of February?

17 A. That I can't testify to.

18 Q. Well, if you want to look at it again, we can do that.
19 Let's look at Exhibits 5, 6, and 7?

20 A. I'll accept your dates.

21 Q. Look at Exhibit 5, that says February 13. If you look at
22 Exhibit 6, that says February 13. If you look at Exhibit 7,
23 that says February 13. If you look at Exhibit 8, that says
24 February 13. And if you look at Exhibit 28, where you sent the
25 BA main email addresses, on February 13.

JA3VMARHredacted

Ferguson - cross

1 So you sent all of that Marsh entity client
2 information to Teros on those dates, right?

3 A. Yes.

4 Q. Two weeks after Ms. Rosen said that you shouldn't do that?

5 A. Mischaracterization. She said I shouldn't send stuff to my
6 personal email. That's not my personal email address.

7 Q. Gotcha. Gotcha. Okay.

8 Now, also, for purposes of expediency, I didn't attach
9 all of the attachments to these email messages just so we
10 didn't burden the Court with too much information. But just
11 for the exhibits that are in this book, would it surprise you
12 that all of that information printed out is two or three inches
13 thick? Would that surprise you?

14 A. I don't know what it is. I'm assuming --

15 Q. All the email messages that we just looked at.

16 A. I'm assuming that's the 3,400 contacts I tried to email to
17 myself and it didn't work.

18 Q. Would it surprise you that it prints out at three inches
19 thick?

20 A. 3,400? No, it wouldn't surprise me at all.

21 Q. And if you take into account all of the information that
22 you emailed to yourself on those dates, would it surprise you
23 that they would fill out four very thick binders of all of the
24 information that was coming off of your Marsh computer that you
25 were sending to Teros? Would that surprise you that it would

JA3VMARHredacted

Ferguson - cross

1 fill four binders of materials?

2 A. 3,400 clients? No. Contacts.

3 Q. But it was more than contacts. You sent contacts, you sent
4 your calendar, you sent, you know -- I mean you retained a
5 client list. You retained all of this information basically to
6 pick up what you thought was your book, even though the
7 documents say that these are clients of the firm. But you took
8 all the information necessary to pick up your book, carried it
9 over to Teros, and then just continue on, right?

10 A. I think you're mischaracterizing.

11 Over 3,000 contacts, you think they were all clients?

12 No.

13 Q. No, no, I'm talking about --

14 A. That was 13 years of my life in that system.

15 Q. Hold on. Hold on.

16 I'm talking about all the information that you emailed
17 to yourself. You picked all of that up from the Marsh computer
18 system and you emailed it to yourself over at Teros, right?

19 A. Correct. As we've discussed today and yesterday, I was
20 instructed I was being forced out of the company, 13 years of
21 that company, all my siblings, my family, they are all in
22 there, their birth dates are in there, and all the important
23 dates of my life are all saved in that calendar. Yes, I wanted
24 it.

25 THE COURT: Let me ask this though: Exhibit 28, which

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Ferguson - cross

1 is the BA main, right, am I correct that -- does that encompass
2 all of the bay area clients?

3 THE WITNESS: It was intended to. I'm the one who
4 created that. It's an old label. I think there's probably
5 some errors, but generally that's what it was intended --

6 THE COURT: Okay. And some of those -- I take it some
7 of those aren't your clients. In other words, that some of
8 them are bay area clients, but they aren't your clients.

9 THE WITNESS: No. So anybody in here would be a
10 client that I worked with.

11 THE COURT: At some point.

12 THE WITNESS: I think there were -- correct. Probably
13 some of them -- well, you know, they might all be clients I
14 worked with specifically.

15 THE COURT: But are there clients that at the time
16 that you sent this that had retirement plans or that you were
17 working with with retirement plans?

18 THE WITNESS: These were all retirement plan clients
19 of mine.

20 THE COURT: Okay.

21 Are there clients that you were no longer dealing
22 with?

23 THE WITNESS: I don't see any, no.

24 THE COURT: You had 68 clients at the time, that was
25 your book of business?

JA3VMARHredacted

Ferguson - cross

1 THE WITNESS: Your Honor, 55. Some of them are --
2 there's more than one for a contact.

3 THE COURT: Okay. And of these, did you also keep or
4 have a spreadsheet and know which of these entities had, in
5 addition to retirement services, other things with --

6 THE WITNESS: No. I didn't concern myself with the
7 other lines of business.

8 THE COURT: Did you ever participate, when you went to
9 a client to pitch them with other members of Marsh, in other
10 words, selling them not only retirement services, but other
11 things.

12 THE WITNESS: Occasionally, yes.

13 THE COURT: Who were the people -- who were some of
14 the people, names of some of the people you dealt with?

15 THE WITNESS: At the client or with --

16 THE COURT: No, at Marsh.

17 THE WITNESS: Marsh.

18 The other producers. So they would bring me out --
19 sometimes if they couldn't close a case, they would bring me
20 out to help close it.

21 THE COURT: But I'm talking about for other products
22 other than retirement products. In other words, where --
23 you're basically selling everything at Marsh or a lot of things
24 that Marsh is providing. Some of them may be retirement, some
25 of it's insurance. So that you have clients that are maybe

JA3VMARHredacted

Ferguson - cross

1 looking for an entity where they can get full service. So did
2 you ever do presentations like that?

3 THE WITNESS: Yes. So I would meet with them for
4 those meetings. A good example is [REDACTED]. They had been
5 trying to close that for quite some time and just couldn't
6 quite get it over the finish line.

7 And [REDACTED] said, Hey, we're really interested in
8 retirement services. So they would bring me out -- and this
9 happened quite often. I would do the presentation. And then
10 if I got the business, they would let me know, but after that
11 we'd go our separate ways. And sometimes I would know if they
12 got the business, other times I would not.

13 THE COURT: Okay. All right.

14 Mr. Wickham.

15 BY MR. WICKHAM:

16 Q. Now, you also, in your declaration, you said that you
17 deleted some of these emails or you said that you couldn't open
18 them, right?

19 A. All of that stuff you have there, it didn't work.

20 Q. So that's not completely correct, right? If you turn to
21 Exhibit 11. And Exhibit 11 is your communications with the
22 401(k) plan committee of Thredup.

23 On March 7 you're sending email messages to the 401(k)
24 committee of [REDACTED], using the contact information that you
25 had taken from Marsh. So at least those email messages, they

JA3VMARHredacted

Ferguson - cross

1 opened up just fine, right?

2 A. No, there's a difference there, counsellor.

3 All of that stuff I sent to myself I couldn't get to
4 open up. That doesn't mean I didn't have this information. I
5 mean Thredup, I know that their email address, even without
6 looking, it's first name dot last name at [REDACTED], except for
7 one person, [REDACTED]. Because she'd been there so
8 long, her email address is [REDACTED]. A lot of these
9 things I just know. I worked with these people for six years.

10 Q. And from 2007 to February of 2019, you had signed a series
11 of agreements with Barney & Barney, and later with Marsh &
12 McLennan, all saying that all of that information was company
13 confidential information; that it was company property, not
14 your property, right?

15 A. Yes. Counsel, we've covered this many times. I get it.
16 MMA's position is that they own this. We've talked many times.
17 I've shown a lot of evidence where we went back and forth,
18 because I said this information is not confidential. And then
19 finally, I'm following Jeff Calder's instructions and Bill
20 Peartree's anyway.

21 Q. That's something else that I'm not quite so clear about.

22 If you turn to Exhibit 22, this is another document
23 you produced in this litigation, do you have that in front of
24 you?

25 A. I do.

JA3VMARHredacted

Ferguson - cross

1 Q. And could you tell me what these -- these two email
2 messages are? Just if you could identify them for me. Just
3 let me know who they're from and who they're to.

4 A. This is between Nate White and myself.

5 Q. Okay. And so one of the messages is Mr. Nate White sending
6 an email message to you on December 20th; correct?

7 A. Correct.

8 Q. And that's Nate White at Teros Advisors. He was the
9 principal at Teros Advisors?

10 A. Correct.

11 Q. Okay. And this is the day of the infamous final warning
12 meeting, right?

13 A. Correct.

14 Q. Okay. So that day you're having a discussion with
15 Mr. White, an advanced discussion about your moving over to
16 Teros, right?

17 A. Correct.

18 Q. So you actually were looking to get out of MMA or Marsh
19 entities, you know, well in advance of the December 20th
20 meeting, right?

21 A. Counsel, you're bringing up old information. I had already
22 shown exhibits that I discovered the deception all the way back
23 as far as what was August. And so I had started exploring my
24 options.

25 Some of my stuff said I was reaching out to clients

JA3VMARHredacted

Ferguson - cross

1 saying, Hey, I think you've been transferred to somebody else.

2 Yes, I was like, Okay, what's going on here?

3 So this December 20th, when Bill Peartree and Jeff
4 Calder said, You're on your way out, here's what we want you to
5 do. So it would be natural for me to reach out and say, Hey,
6 Nate, it looks like I am on my way out.

7 Q. Mr. Ferguson, we've got limited time because Mr. Calder
8 needs to catch a plane, I have to catch a plane. So if you
9 could just listen to my questions, answer them. I'm going to
10 try to be as efficient as I can.

11 All I wanted to find out was that did you, prior to
12 that infamous December 20th meeting, already have plans to
13 leave Marsh?

14 A. No.

15 Q. So why were you having these advanced discussions with
16 Mr. White on December 20th about compliance, about Triad, about
17 RIA? Why were you having those discussions with Mr. White at
18 that point in time?

19 A. Because it's clearly me asking, what is your company like?
20 It's okay, counsellor, for me to reach out and ask about other
21 companies. I didn't have to live at MMA the rest of my life.
22 It's perfectly fine for me to reach out and say, Hmm, maybe I'd
23 like to make a move, especially given the events that were
24 happening. It would be more than natural that I was thinking,
25 With my time limited here, maybe I need to keep my options

JA3VMARHredacted

Ferguson - cross

1 open.

2 THE COURT: But in your top email in your response on
3 January 2nd, right, by then, right, you're basically saying
4 you're crafting an email to your clients.

5 THE WITNESS: January 2nd, that's much later. So
6 December 20th is when I sent that, because it's like, all
7 right, up to that point I didn't really know what was going on.
8 December 20th, Jeff Calder and Bill Peartree made it extremely
9 clear to me that I was on my way out. So I reach out. So
10 between then and, then, yeah, obviously if I know I'm on my way
11 out, then I pretty much was going to go with Teros.

12 Q. Okay. But, Mr. Ferguson, even your statement about the
13 December 20th meeting that you just made, that isn't true
14 either.

15 Isn't it accurate that as early as September of 2018
16 and in August of 2018, that Mr. Peartree, Mr. Calder, others
17 within MMA, had discussions with you to describe all of these
18 things, the Jeff Stephens joining the firm, your participation
19 of that, your active encouragement of Mr. Stephens coming into
20 the firm? And they were looking for a solution of how do they
21 bring in this new producer and to meet his compensation needs
22 in a manner that would not lead to your loss of any
23 compensation.

24 And it was when you had found out that Mr. Stephens
25 was going to be picking up and receiving commissions that

JA3VMARHredacted

Ferguson - cross

1 weren't being paid to you, so you weren't losing anything, it
2 was only when you found out that Mr. Stephens was going to
3 start picking that up, that that's when suddenly, you know,
4 your being in favor of Mr. Stephens joining turned into this
5 big situation where you were no longer in favor of that, right?

6 A. Well, you're incorrect. That's a very long statement. But
7 even the last part where you said, okay, I wasn't receiving the
8 commissions, we have said two of my bonuses were -- one was
9 specifically based off of those commissions, and the other one
10 was too. So if I don't have any commissions, now I don't get
11 any bonus --

12 THE COURT: Wait, wait, wait.

13 Those two were the one-time 25 percent?

14 THE WITNESS: Well, and then the other one was based
15 on my ongoing book of business.

16 THE COURT: But the other one was based upon your
17 service. In other words, you could have continued, as I
18 understand it, even if you weren't a fiduciary, to service
19 those clients. You still would have done the same spreadsheet
20 showing what the -- right?

21 In other words, they still would have been part of
22 what you would have been able to present for that particular
23 bonus, in other words, what clients you're basically providing
24 services to.

25 THE WITNESS: No, your Honor. That would no longer be

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Ferguson - cross

1 my responsibility. I wouldn't be doing that.

2 I did that because I saw myself as a producer in the
3 hybrid role. That was based on to get that -- but I was also
4 getting for the service, so I kept track of it myself. But the
5 minute I stopped being a producer, a producer's job is to do
6 all that. And given the fact that I couldn't really -- I hate
7 to say, I couldn't really trust MMA on my pay, this was very
8 frightening for me. But I would not know what they would base
9 it off of.

10 THE COURT: All right.

11 THE WITNESS: So, counsel, to answer your question --
12 BY MR. WICKHAM:

13 Q. Mr. Ferguson, it's okay.

14 Let me show you something. You just said you were a
15 producer. And let's just -- let's get that clarified.

16 MR. WICKHAM: Your Honor, permission to approach the
17 bench.

18 THE COURT: You may.

19 MR. WICKHAM: We'll mark this as Exhibit 31.

20 THE COURT: Okay. Thank you.

21 Q. Have you seen Exhibit 31 --

22 A. Mm-hmm.

23 Q. -- Mr. Ferguson?

24 And is this an email message that you sent to Bill
25 Peartree on or about September 23, 2014?

JA3VMARHredacted

Ferguson - cross

1 A. It is.

2 Q. And you were talking to Mr. Peartree about wanting to
3 schedule a time for a call, right?

4 A. Correct.

5 Q. And in this message, you confirmed to Mr. Peartree that you
6 spoke to Mr. Calder, and that you indicated that you were going
7 to be returning to service or with some sort of a hybrid
8 option, but that you were leaving the sales, you were leaving
9 the producer role, you were returning to service, right?

10 A. That's what it says in this email, because it's what I was
11 instructed to do by Jeff Calder.

12 I remember this specifically. There is another email
13 that you're not producing where I sent to Jeff Calder right
14 after this, saying, Jeff, I've made nice with Bill as you told
15 me to or something along those lines. They had forced me --
16 the part we didn't get into in my testimony, when I started to
17 go over my commissions, this isn't the time frame when -- so we
18 do agree that during 2014, I was a producer.

19 But for some reason, they refused to pay me the money
20 that I was owed. They came to me and said, You didn't make any
21 money. But my exhibits specifically show I validated my
22 contract, I made almost \$300,000 that year, and they refused to
23 accept that. And they said, No, we're only crediting you with,
24 I believe it was, about \$10,000. So you have to go back to
25 doing service.

JA3VMARHredacted

Ferguson - cross

1 One of the things we were arguing about is I said,
2 Look, I'm a producer, but you won't give me any service, like a
3 service person, like you do everybody else.

4 So this is part of all we were arguing about. And
5 Jeff Calder told me, he said, Rick, if you don't do this role,
6 this hybrid role, there really isn't a place for you here.

7 So I did this, what I had to do to keep my job and
8 accept it. And I had to make nice with Bill Peartree because
9 it was at this point I was accusing Bill Peartree of
10 withholding my pay, which my documents show he did.

11 Q. Were you lying in this email message?

12 A. No, I wasn't lying. I --

13 Q. When you said, I told Jeff today that I would rather be in
14 service with some sort of a hybrid option to keep bringing on
15 new business, which is what happened, was that a true statement
16 or now are you saying that you made a false statement to
17 Mr. Peartree?

18 A. No, this was -- my option was there's no place for you here
19 or you tell us that you want the hybrid role.

20 Q. I don't see the words "I was forced" anywhere in this
21 sentence; is that right?

22 A. If I'm trying to make nice with somebody who I just had a
23 huge argument with, why would I do that?

24 Q. And then your next sentence says: Putting my ego aside, I
25 really feel that that be best for all involved.

JA3VMARHredacted

Ferguson - cross

1 Did you think that your returning to service would be
2 best for all involved? And is that why you wrote that in this
3 message?

4 A. I didn't really have a choice, did I? There was no one to
5 do service. You see there where I state down below -- or here,
6 someone needs -- we need someone to focus on and be in charge
7 of files, compliance, general management, overall book of
8 revenue. I know you weren't there, but at this time this is
9 one of the big things we were arguing about. Every producer at
10 Barney & Barney or MMA -- this time it was Barney & Barney --
11 is also assigned a service person. And that service person
12 goes out on meetings with them, takes notes, does all the
13 follow-up work. I, for some reason --

14 Q. Mr. Ferguson, we're running out of time. Mr. Calder has to
15 leave in ten minutes.

16 I think I've already asked my question. I would like
17 to move on to my next one.

18 THE COURT: Go ahead.

19 Q. Would you please turn to Exhibit 24 in our book.

20 A. I'm there.

21 Q. So this is an email, another email from you to Nate White
22 at the top, January 29, 2019.

23 A. Correct.

24 Q. And is this some sort of a hit list of clients that you're
25 going to be soliciting?

JA3VMARHredacted

Ferguson - cross

1 A. These are the list of my clients.

2 Q. Those are all the clients that you solicited?

3 A. I didn't solicit them. I went to them and I said, Here's
4 your choice.

5 Q. Right. You asked them whether they would move over to
6 Teros with you, right?

7 A. I said, You can either stay with Jeff Stephens or you can
8 go with me.

9 Q. Okay. Well, even under California law, that's a
10 solicitation, even more so under New York law.

11 And you signed an agreement with Marsh entities
12 promising not to solicit clients?

13 A. But it was -- it states, unless -- I can send this out if
14 I'm following the instructions or doing the business of MMA or
15 B&B, which I was.

16 Q. Okay. And then also Exhibit 25 please.

17 Now, what this is is a message from you to, again,
18 Mr. White at Teros, February 8, 2019, at a point in time when
19 you're still an MMA employee, right?

20 A. Correct.

21 Q. Right? Okay.

22 And here you actually have two tranches of clients
23 that you're planning on soliciting. There's the first tranche,
24 the ones that you described as the yes clients, you know, as
25 the list starting with [REDACTED]. And then the second round,

JA3VMARHredacted

Ferguson - cross

1 who you said that you're not sure about, starting with
2 [REDACTED] and continuing on to the bottom on the next page,
3 the [REDACTED].

4 Was that the order that you were going to first
5 solicit the first wave and then solicit the second wave for the
6 ones you weren't so sure about?

7 A. No, a little bit different. There were ones that --
8 remember, I've already talked -- this is, what, February. I've
9 already talked with most of these people. Some said, Well, we
10 think we might want to stay. So they were going to have a
11 meeting with Jeff Stephens and see what they felt about him.

12 Some said, Well, no, Rick, we want to be with you. So
13 breaking it up. As I was instructed to do, give them the
14 choice. Some clients automatically want to go with me. Some
15 are like, Well, no, send us more information; we want to think
16 about this.

17 Q. Okay. Just to button things up, turn to Exhibit 15.

18 Do you recognize these as all your W-2s with Marsh &
19 McLennan Agency?

20 A. Yes.

21 Q. Listed as your employer?

22 A. Yes.

23 Q. And you were prolific with your raising issues, compliance
24 issues, and everything else.

25 Did you ever raise any issues with your tax forms,

JA3VMARHredacted

Ferguson - cross

1 something that most people probably spend the most time
2 scrutinizing in the year? Did you ever go into, you know,
3 Marsh's tax department and say, Oh, what are you doing? Why
4 are you putting down MMA as my employer?

5 A. Counsellor, you're mischaracterizing. There's nothing
6 wrong with -- the income, as we covered so many times, the
7 income has to flow, the client, the financial companies, over
8 to the MMA Securities, then it's fine if they repatriate it
9 under corporate law, just like a subsidiary repatriating money
10 up to their parent, that's fine. And then the parent can pay
11 me.

12 As we saw in one of my agreements that I signed, the
13 correct version it's supposed to be for all people like me
14 under securities, that happens, they get to keep a portion, but
15 it's clarified as I am paying them for ministerial and
16 administrative services. That's how these contracts are
17 supposed to be.

18 In a way, I'm arguing to protect MMA. Because if it's
19 found that they were getting commissions directly, they are in
20 trouble.

21 Q. You didn't answer my question.

22 Did you ever go to anybody at Marsh and complain about
23 these W-2s --

24 A. I just explained there's no problem with that money
25 going --

JA3VMARHredacted

Ferguson - cross

1 Q. Did you or not?

2 A. No.

3 Q. Go to Exhibit 16 please.

4 A. Okay.

5 Q. This is one of the email messages that you sent to Diane
6 Rosen, right? Do you see that there?

7 A. Correct.

8 Q. Now, underneath the word "thank you," it's usually what we
9 refer to as a signature block. Do you see that there?

10 A. I do.

11 Q. And did you have a designation, AIF?

12 A. Yes.

13 Q. What is that?

14 A. Accredited investment fiduciary.

15 Q. Okay. It's an important thing.

16 A. I have a fiduciary duty to my clients.

17 Q. Right.

18 CEBS, is that another designation you had?

19 A. Yes.

20 Q. Okay. Now, this says: Client Executive, Retirement
21 Services Division, Marsh & McLennan Agency LLC. Do you see
22 that there?

23 A. Yeah. I'll actually point out that as Jeff Calder --

24 Q. I just asked you whether you saw it there. Do you see that
25 there?

JA3VMARHredacted

Ferguson - cross

1 A. Yes.

2 Q. Okay. And did that same signature block appear on every
3 one of your email messages that you sent out while you were
4 working at the Marsh entity?

5 A. Yes, it did. It says I was a client executive, which is a
6 producer, as Jeff Calder testified to earlier.

7 Q. It says client executive.

8 A. Correct. As Jeff Calder said earlier, client executive is
9 a producer.

10 Q. It says retirement services division, right?

11 A. Is a producer.

12 THE COURT: Come on. This isn't -- this is not an
13 argument, right. Mr. Wickham will ask a question, you provide
14 the answer, and we're not getting into a back-and-forth.

15 THE WITNESS: I understand.

16 Your Honor, am I allowed to point out --

17 MR. WICKHAM: There's no question pending.

18 THE WITNESS: Okay.

19 BY MR. WICKHAM:

20 Q. Now, lastly, you just had explained your understanding of
21 how revenue might move if it was coming into MMAS; and then as
22 part of an integrated entity with MMAS serving within the
23 corporate hierarchy, either as a subsidiary or an affiliate,
24 that that money would ultimately move up to MMA's financial
25 statement. That's your understanding of things?

JA3VMARHredacted

Ferguson - cross

1 A. Generally, yes.

2 Q. Okay. So the money that you took away from the Marsh
3 entities for the clients that you had taken away from them
4 meant that MMA would be suffering financial loss from the
5 going-forward revenue, right?

6 A. MMAS suffers, because that's the --

7 Q. Well, no, that's not what you said. You said that you
8 understood that the money would come in from MMAS and then
9 would go up to MMA, and that's why you said that it was
10 appropriate to have the W-2s with MMA being shown as your
11 employer.

12 So I'm just asking the obvious follow-up question,
13 which is that MMA would suffer a financial loss if you are
14 taking away all of these clients, even if they were MMAS
15 clients or if they were dual clients of both entities, which
16 they would be?

17 A. Actually, Seabury & Smith --

18 Q. But in any event, that MMA would be suffering a financial
19 loss, you recognize that, right?

20 A. Well, no, you've missed one of them. Seabury & Smith is in
21 there. They actually own MMAS; MMA owns them. So actually
22 Seabury & Smith, by your definition of this. And then there
23 are six other entities involved as well that also own --

24 Q. Okay.

25 THE COURT: But all the money -- once it goes upstream

JA3VMARHredacted

1 from MMAS, all of those entities are going to lose money if the
2 clients go elsewhere, right?

3 THE WITNESS: If it went high enough, sure, all the
4 way up to Marsh and Marsh & McLennan companies.

5 THE COURT: Right.

6 MR. WICKHAM: That's all that we have, your Honor.

7 THE COURT: All right.

8 MR. WICKHAM: We're not going to call a rebuttal
9 witness, your Honor.

10 THE COURT: All right.

11 So I guess you can step down, Mr. Ferguson.

12 (Witness excused)

13 THE COURT: So I know that there's still the issue of
14 third-party --

15 MR. WICKHAM: Can I let Mr. Calder leave?

16 THE COURT: Yes. Absolutely. Mr. Calder, you
17 should --

18 MR. WICKHAM: With our thanks, Mr. Calder, I hope you
19 make your plane.

20 THE COURT: Safe travels.

21 MR. WICKHAM: I personally also have a plane to catch.

22 THE COURT: No, what I would suggest is the following:
23 Because I'm not adverse to having post-hearing briefing. There
24 are a whole bunch of things I know I've raised that I've asked
25 for to get documents on.

JA3VMARHredacted

1 So I'd ask you meet and confer with Mr. Ferguson,
2 figure out a time frame of post-hearing briefing. And just let
3 me know what you think on the timing on the other materials, as
4 well as I know you're going to be negotiating with Mr. Temkin.

5 So within a week, give me a status update letter by
6 the end of next week.

7 MR. WICKHAM: We've requested the transcript, your
8 Honor.

9 THE COURT: Yes.

10 MR. WICKHAM: The court reporter, she's a little
11 backlogged; she probably won't get it for a week. I wanted to
12 be able to go through the transcript and identify all the
13 things you needed.

14 THE COURT: Sure. That is absolutely fine.

15 So why don't we say -- I also don't want to -- however
16 you want to order the transcript is fine. So why don't we say
17 two weeks. If you need more time, let me know. Two weeks to
18 let me know with a status update. How does that sound?

19 MR. WICKHAM: Terrific.

20 And then we'll confer with Mr. Temkin, actually before
21 then, and we'll confer with Mr. Ferguson and discuss some sort
22 of a briefing schedule.

23 My suggestion is that we just pick a date for
24 simultaneous briefs to be submitted.

25 THE COURT: I was going to suggest that.

JA3VMARHredacted

1 MR. WICKHAM: And that we would provide the Court with
2 the supplemental information the Court has identified during
3 the hearing.

4 THE COURT: Okay.

5 Ms. Williams, two weeks from tomorrow, just so that we
6 have a date.

7 THE DEPUTY CLERK: The 18th.

8 THE COURT: The 18th.

9 So if you need more time because of whatever, just let
10 me know.

11 MR. WICKHAM: Thank you, your Honor.

12 MR. FERGUSON: Your Honor?

13 THE COURT: Yes.

14 MR. FERGUSON: So are we going to handle the motion to
15 dismiss or compel arbitration?

16 THE COURT: What I would say is if the parties want to
17 have argument on that -- typically it's only after I review the
18 papers and I decide whether or not -- then that's what I'll do.

19 Although I haven't looked at them, I can tell you that
20 I have not and I'm not in a position to make a call about
21 whether or not oral argument is going to be necessary. If I
22 deem that it is, I will issue an order and I will list the
23 questions that I have for both sides that I want addressed
24 during the oral argument.

25 MR. FERGUSON: I understand, your Honor.

JA3VMARHredacted

1 THE COURT: All right.

2 MR. FERGUSON: Will I get a notice via the court
3 document or something, or will you reach out to me directly
4 or --

5 THE COURT: I think Mr. Wickham was planning on
6 reaching out to you directly.

7 MR. FERGUSON: Thank you.

8 THE COURT: That raises another issue. Are you on
9 ECF?

10 MR. FERGUSON: Yes.

11 THE COURT: Okay. So you'll get notification.

12 All right. Thank you very much, everyone.

13 MR. WICKHAM: Thank you very much for your patience,
14 your Honor.

15 THE COURT: All right. Take care.

16 And safe travels to everybody who is traveling. For
17 those folks who are here, hopefully the rain won't be too bad.

18 MR. WICKHAM: Thank you.

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